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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 449

E. S. SMITH, APPELLANT,

vs.

W. B. CAHOON, SHERIFF OF DUVAL COUNTY, FLORIDA

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

FILED SEPTEMBER 11, 1930

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INDEX

	Original	Print
Proceedings in supreme court of Florida	a	1
Caption (omitted in printing)	a	
Record from circuit court of Duval County	2	1
Petition for writ of habeas corpus	2	1
Record from justice of peace court	8	5
Testimony of L. R. Cooper	9	5
E. S. Smith	11	8
L. R. Cooper (recalled)	17	13
B. C. Naugle	19	16
E. R. Brissette	22	19
G. J. Curren	26	23
E. S. Smith (recalled)	29	25
Motion to dismiss and order	29	25
Writ of habeas corpus and return	33	28
Commitment, justice of peace court	35	29
Judgment releasing defendant	37	31
Petition for allowance of writ of error	43	35
Order allowing writ of error	46	37
Assignment of errors	47	38

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		Page
Writ of error	49	39
Writ of scire facias and return	51	40
Præcipe for transcript of record	53	41
Clerk's certificate (omitted in printing)	55	
Argument and submission (omitted in printing)	56	
Opinion, Whitfield, J.	57	43
Judgment	64	48
Petition for rehearing (omitted in printing)	67	
Order denying rehearing	69	48
Mandate	71	48
Petition for appeal, assignments of error, and prayer for reversal	74	50
Order allowing appeal	80	53
Citation and service (omitted in printing)	83	
Bond on appeal (omitted in printing)	86	
Stipulation re transcript of record	90	54
Clerk's certificate (omitted in printing)	92	
Statement of points to be relied upon and designation to print entire record	93	55

[fols. a & 1] [Caption omitted]

[fol. 2]

IN CIRCUIT COURT OF DUVAL COUNTY, FOURTH JUDICIAL CIRCUIT

E. S. SMITH, Plaintiff,

vs.

W. B. CAHOON, as Sheriff in and for Duval County, Florida, Defendant

PETITION FOR WRIT OF HABEAS CORPUS—Filed Aug. 21, 1929

To the Honorable Judges of the said Court:

Now comes your petitioner, E. S. Smith, and respectfully represents unto your Honor- that he is detained of his liberty without any authority of law. That on, to-wit: the 21st day of August, A. D. 1929, your petitioner had a preliminary trial upon a warrant charging him as follows:

"E. S. Smith was owning and operating, or controlling, or managing two motor propelled vehicles in said District and County not usually operated on or over rails, but operated upon the public highways of said District, County and the State of Florida, said vehicles being a truck of two and one-half tons capacity, and a trailer of two and one-half tons capacity, and he used said motor vehicles in the business of transporting property for compensation over public highways in the State and between fixed termini and over regular routes, such routes being from Jacksonville to Melbourne and return on Monday, from Jacksonville to Titusville and return on Wednesday, from Jacksonville to Fernandina and return on Thursday morning, from Jack-
[fol. 3] sonville to Vero Beach, and from there to Ft. Pierce, leaving Jacksonville every Thursday afternoon, and returning to Jacksonville on Friday. Said trips are made each week. The said Smith has not made any application for certificate of public convenience and necessity, and he has not received from the Railroad Commission of the State of Florida a certificate that the present or future public

convenience and necessity requires, and will require, such operation. The said Smith has not paid to the Comptroller $150.00, as an advance payment upon mileage tax required and levied, for the operation of said vehicles, all of which is a violation of Chapter 13700, Laws of the State of Florida, 1929,"

and at said trial after testimony taken petitioner was bound over and committed for trial in the Criminal Court of Record in and for Duval County, and is now unlawfully deprived of his liberty in the custody of the said Sheriff. And petitioner submits:

First. That the evidence taken at said trial and attached hereto and made a part hereof, fails to show a violation of any law of the State of Florida.

Second. That Chapter 13700, Laws of the State of Florida, 1929, is invalid, null, void and unconstitutional.

(A) Because said legislation denies to petitioner his rights of acquiring, possessing and protecting his property guaranteed to him by Sec. 1, of the Declaration of Rights of the Constitution of the State of Florida.

(B) Because the said Act undertakes to deprive petitioner of his property without due process of law in violation of Sec. 12, of the Declaration of Rights of the Constitution of the State of Florida, and the 14th Amendment to [fol. 4] the Constitution of the United States.

(C) Because said legislation is arbitrary, unreasonable and constitute an unreasonable classification.

(D) Because said Act denies to petitioner the equal protection of the laws as guaranteed to him by Sec. 1, of the Declaration of Rights of the Constitution of the State of Florida, and the 14th Amendment to the Constitution of the United States.

(E) Said Act would deprive petitioner of his liberty without due process of law.

(F) Because the said tax attempted to be imposed upon petitioner and all who are similarly situated is arbitrary, unreasonable, discriminatory and amounts to confiscation.

(G) Said Act does not apply to all who are similarly situated equally.

(H) Said Act impairs the obligation of a contract between the petitioner and the State of Florida, and between the petitioner and those with whom he has contracted to do hauling in violation of Sec. 17 of the Declaration of Rights of the Constitution of the State of Florida, and Sec. 10, of Art. 1, of the Constitution of the United States.

(I) Said Act violates Secs. 20 and 21 of Art. 3, of the Constitution of the State of Florida, in that it imposes a tax for the specific purpose of revenue and not for regulation, and should apply to all trucks, trailers and busses alike, or based upon some reasonable classification.

(J) Said Act violates Secs. 1 and 5, of Art. 9, of the Constitution of the State of Florida in that it is not a license tax, and it is not an ad valorem tax.

(K) Said Act violates Sec. 2, of Art. 9, of the Constitu-
[fol. 5] tion of the State of Florida in that the purpose of the levy of the said tax is not a current expense of the State.

(L) Said Act violates Sec. 3 of Art. 9 of the Constitution of the State of Florida, because the levy of such tax is not in pursuance of law.

(M) Said act violates Sec. 4 of Art. 9, of the Constitution of the State of Florida because the appropriations attempted to be made is illegal, null and void.

(N) Said Act violates Sec. 6, of Art. 9, of the Constitution of the State of Florida because the Legislature cannot levy a State tax, or appropriate State money for the purpose of paying the principal or interest, in whole or in part, of County bonds.

(O) Said Act violates Sec. 5 of Art. 9, of the Constitution of the State of Florida, because the Legislature is prohibited from levying a County tax.

(P) Said Act violates Sec. 16, of Art. 3, of the Constitution of the State of Florida because it contains more than one subject and matter properly connected therewith, and the subject matter of the Act is not briefly expressed in the title.

(Q) Said Act violates Sec. 30, of Art. 3, of the Constitution of the State of Florida, because it makes appropriations and contains provisions upon other subjects.

(R) Said Act violates Sec. 30, of Art. 16, of the Constitution of the State of Florida in that it attempts to regulate not only common carriers, but private carriers.

(S) The Legislature is prohibited by the Constitution from making a private carrier, or a private contract hauler a common carrier.

(T) The Tax attempted to be imposed by said Act is not authorized by the Constitution of the State of Florida.

(U) Said Act is so vague, uncertain indefinite and in the [fol. 6] alternative that it does not constitute a law within the meaning of the Constitution of the State of Florida.

(V) Said Act attempts to levy a toll per mile for the use of any public road in the state, and many of the roads over which petitioner hauls are Federal Aid Roads, and the imposition of such tolls is in violation of the statutes of the United States with reference to Federal Aid Roads.

Your petitioner further prays that your Honor grant unto him the State's most gracious writ of habeas corpus, to be delivered to the said W. B. Cahoon, Sheriff of Duval County, Florida, and returnable forthwith before your Honor according to the form of statute in such cases made and provided, and then and there show cause why he holds your petitioner unlawfully in custody, and upon what lawful grounds he seeks to deprive your petitioner of his liberty, and your petitioner prays on final hearing hereof that he may be discharged from further custody.

J. E. Mathews, Attorney for Petitioner.

Duly sworn to by E. S. Smith. Jurat omitted in printing.

[fol. 7] STATE OF FLORIDA,
County of Duval:

I, W. B. Cahoon, Sheriff of Duval County, Florida, do hereby acknowledge service of a certain habeas corpus proceeding instituted by E. S. Smith, and hereby waive all other and further service of notice.

——— ———, Sheriff,

[fol. 8] IN JUSTICE OF THE PEACE COURT, 11TH DISTRICT, DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

vs.

E. S. SMITH, Defendant

Preliminary Hearing for Violation of Chapter 13700, General Laws of the State of Florida

TESTIMONY & PROCEEDINGS BEFORE HON. M. B. CRAIG, JUSTICE OF THE PEACE, COMMENCING AT 9:30 O'CLOCK IN THE FORENOON, WEDNESDAY, AUGUST 21ST, 1929

Present: John E. Matthews, Esquire, representing the defendant Smith.

Reporter: V. F. Halter.

The Court: Mr. Smith——

Mr. Matthews: We waive arraignment and plead not guilty.

The Court: This is the case of E. S. Smith, charged with violating the bus and truck law.

[fol. 9] Mr. Matthews: It's all in one law.

And thereupon one L. R. COOPER was produced as a witness on behalf of the State of Florida, —, having been first duly sworn, testified as follows:

Direct examination.

By the Court:

Q. Mr. Cooper, you signed the affidavit in this case, did you?

A. Yes, sir.

Q. That Mr. Smith was operating a truck in violation of the laws of the State of Florida, recently passed, Section 13700?

A. Yes, sir.

Q. Are you familiar with that law, Mr. Cooper?

A. Well, some, yes, sir.

Q. What's your business?

A. I am in the trucking business.

Q. You are in the trucking business?

A. Yes, sir.

Q. Do you know whether or not Mr. Smith is operating a truck in violation of this law?

A. Well, he has never filed his application for franchise here.

Q. In other words, Mr. Cooper, Mr. Smith has not yet complied with this law?

A. No, sir.

Q. With payment to the Comptroller of the State of Florida, the amount assessed for the operation of each of said trucks?

A. No, sir.

Q. You know that to be true?

A. Yes, sir.

The Court: That's all.

Cross-examination.

By Mr. Matthews:

Q. Mr. Cooper, do you know anything about what schedule Mr. Smith runs on?

[fol. 10] A. Well, he leaves on Monday, here; he goes to Melbourne on Monday.

Q. Just tell his whole schedule as you know it.

A. On Tuesdays he goes to—you read it off there, Mr. Matthews. I got it down there.

The Court: Do you know how many trucks he operates?

A. Operates one; two ton and a half truck and two ton and a half trailer.

Q. He couldn't go to Melbourne on Mondays and somewhere else on Tuesdays?

A. Yes, sir.

Q. Do you know whose freight it is, whether it's——

A. It's the A. & P. Company; that's all he hauls.

Q. In other words he doesn't haul just to collect freight from merchants?

A. No.

Q. He has a regular—regular accounts of merchandise that he does exclusive business with?

A. Yes, sir.

Q. He doesn't operate——

Mr. Matthews: I think I can develop that. I will bring that out.

The Court: There's nothing about that schedule that's——

Mr. Matthews: Oh yes, that's very material.

Mr. Matthews: The schedule: from Jacksonville to Melbourne and return on Monday of each week; from Jacksonville to Titusville and return on Wednesdays of each week; from Jacksonville to Fernandina and return every Thursday morning of each week; then every Thursday afternoon he leaves Jacksonville for Vero Beach and from there to Fort Myers—or Fort Pierce, returning from Fort Pierce to Jacksonville on Friday.

[fol. 11] Q. Mr. Cooper, do you know whether or not Mr. Smith has paid the $75.00 required by this law for the truck, and $75.00 for the trailer?

A. No, sir.

Q. He has not?

A. No, sir.

Q. Do you know whether or not he has applied for a certificate of public necessity from the Railroad Commission?

A. No, he hasn't.

Q. Has he obtained any such certificate from the Railroad Commission?

A. No, sir.

Q. Do you know whether or not on Monday of this week he operated his truck and trailer over the public roads in this district, going to Melbourne?

A. Yes, he did.

Q. He does right along out here almost in front of this building?

A. Yes, sir.

The Court: This building is situated at the corner of Bay and Clay Street?

A. Yes, sir.

Mr. Matthews: That's all.

(Witness excused.)

The Court: Mr. Smith, hold up your hand.

(Thereupon the defendant was sworn.)

The Court: Any statement you make in this case will be used against you should you be bound over to the Criminal Court.

Mr. Matthews: Yes, sir.

The Court: You realize that, Mr. Smith?

A. Sir.

The Court: Any statement you make in this case will be used against you should you be bound over to the Criminal Court.

A. Yes, sir.

Mr. Matthews:

Q. Mr. Smith, are you the defendant in this case?

A. Yes, sir.

[fol. 12] Q. Mr. Smith, do you operate a truck and trailer?

A. Yes, sir.

Q. Going from—on the public roads of Florida?

A. Yes, sir.

Q. Please state what schedule you have, if you have a schedule?

A. I leave here on Monday and go to Melbourne; return Tuesday. Wednesday, Titusville and return Wednesday evening. Thursday morning to Fernandina and back. Thursday evening to Vero Beach and Fort Pierce and return Friday.

Q. You make that regular run between those fixed and different points every week?

A. Yes, every week.

Q. What is the capacity of your truck?

A. Two and a half.

Q. What kind of truck is it?

A. Mack.

Q. What's the capacity of the trailer?

A. Two and a half.

The Court: Tons?

A. Yes, sir.

Mr. Matthews:

Q. Who do you haul for?

A. A. & P. Tea Company.

Q. Do you haul for anybody else?

A. No, sir.

Q. Have you got a definite contract with the A. & P. Tea Company?

A. I have.

Q. To haul for them and no one else?

A. Yes, sir.

Q. Did you ever hold yourself out to the public as being a public hauler or hauling for anybody?

A. Did not.

Q. Please state what is your contract with the Atlantic & Pacific Tea Company, that is, the rates per hundred pounds of merchandise from the various points?

A. Well, it runs from here to Melbourne, 55¢ per hundred pounds.

Q. Per hundred pounds?

A. Flat, yes. 50¢ from here to Titusville; 55¢ from here [fol. 13] to Vero Beach; 60¢ to Fort Pierce; 30¢ to Fernandina.

Q. What does a set of tires on the truck cost you?

A. Do you mean just the truck alone?

Q. I will get the truck first and the trailer next. I want to get it separate so the Court can figure up what the total cost of this operation is.

A. Why, about five hundred dollars.

The Court: You mean for four tires?

A. Yes, sir.

Mr. Matthews:

Q. See, he has double tires on the rear.

The Court: Practically a hundred dollars a tire?

A. No, sir.

The Court:

Q. Eighty dollars?

A. Yes, sir, somewhere about eight- or eighty two dollars.

Mr. Matthews:

Q. What do the tires on the trailer cost you?

A. Same thing.

Q. You only have four on the trailer?

A. Yes, sir.

Q. What is the life of a set of those tires?

A. About six months.

Q. What is the mileage from here to—from the warehouse where you load, to Fernandina?

A. Thirty five miles.

Q. What is the mileage from the warehouse where you load to Titusville?

A. Hundred and forty four and a half miles.

Q. What is the mileage from the warehouse where you load to Melbourne?

A. One hundred and eight- six.

Q. What is the mileage from the warehouse where you load to Vero Beach?

A. Two hundred and nineteen.

Q. Vero Beach to Fort Pierce?

A. Two hundred and thirty three.

The Court: Not Vero Beach to—You mean from here to Fort Pierce?

[fol. 14] Mr. Matthews: No, he goes from Vero Beach to Fort Pierce. That's fourteen miles?

A. Yes, sir.

Q. The total distance from here to Fort Pierce is two hundred and thirty three miles.

A. That's what I said.

Q. The- you would make twelve hundred miles per week?

A. Yes, sir.

Q. Going and coming?

A. Yes, sir.

Q. What mileage *to* you get out of gasoline for those trucks?

A. Why on an average of about eight miles.

Q. What does gasoline cost you per gallon?

A. Twenty two cents.

Q. Included in that is six cents a gallon tax?

A. Yes, sir.

Q. That would make the gasoline itself sixteen cents a gallon for the truck?

A. Yes, sir.

Q. Now, what is the cost of that truck? Just the truck alone?

A. With the body and all?

Q. Yes, the complete truck?

A. Forty eight hundred and fifty dollars.

Q. What is the cost of the trailer?

A. Eleven hundred and thirty five dollars.

Q. What is the life of that equipment? In other words if you make even a thousand miles a week, that would be fifty two thousand miles a year, one hundred and fifty six thousand miles in three years. What is the life of your equipment, the truck and trailer?

A. Why, I should say about three years.

Q. Do you pay a license tag for a tag on that truck?

A. Yes, sir.

Q. What is that?

A. One hundred and eight- six dollars and fifty cents.

Q. Have you got the tag for your truck?

A. Yes, sir.

Q. Do you pay a license—for a license tag on your trailer?

A. Yes, sir.

Q. How much does that cost?

A. One hundred and forty two dollars and fifty cents.

[fol. 15] Q. When did you buy this equipment?

A. February 15th.

Q. Then, of course, you will have to pay an ad valorem tax in January on this same equipment? That is property tax on it too?

A. Yes, sir.

Q. What kind of insurance, liability insurance and so forth do you carry and what does it cost you?

A. Why, I carry cargo insurance; it costs one hundred dollars.

Q. A year?

A. Yes, sir.

Q. Any liability insurance for accidents and things like that?

A. Yes, sir.

Q. What does that cost you?

A. Why, that's all included in the same clause.

The Court: That hundred dollars?

A. Yes, sir.

The Court: Must be more than that.

Mr. Matthews: You say it's a combined policy. Do you carry fire, theft and collision insurance?

A. Yes, sir.

Q. What does that cost?

A. Hundred dollars.

Q. In addition to the other hundred?

A. Yes, sir.

Q. These tags that you get, one costing one hundred and eighty six dollars and fifty cents, and the other one costing one hundred and forty two dollars and fifty cents per annum, are they for hire tags?

A. Yes, sir.

The Court: That for hire tag in that case, that gives you the right to do business with anyone any time?

A. Yes, sir.

Q. But in your special business your contract is exclusively with the A. & P. Company?

A. When I made the application for a license, I told them I was going to haul exclusively for one concern; they told me I would have to have a for hire license to do that.

Mr. Matthews: That's the law; you have got to have a fore hire license if you are hauling for a concern under a contract.

[fol. 16] Mr. Matthews:

Q. Do you have to have a helper with you?

A. Yes, sir.

Q. What do you have to pay him a week?

A. Eighteen dollars a week.

The Court: Expenses too?

A. Yes, I pay some of the expenses too.

Q. Eating?

A. Yes, sir.

Mr. Matthews:

Q. What does that helper cost you per week counting his expenses and the pay?

A. It costs about twenty to twenty two dollars a week.

Q. You are positive you do not hold yourself out as hauling for any and everybody?

A. No, sir.

Q. You do not haul for anybody except the A. & P.?

A. No, sir.

The Court: Haven't, this year?

A. No, sir. I have had offers to haul rosin from Saint Augustine, some for sixty five cents a barrel and from New Smyrna and I wouldn't put my hand on it.

Mr. Matthews:

Q. So all the revenue you received this year came directly from the A. & P. Tea Company?

A. Yes, sir.

Q. What is the amount of oil you use per week in this truck? Lubricating oil?

A. Fourteen quarts.

Q. What does it cost you?

A. Cost fifty six cents per gallon.

Q. What are your expenses for upkeep and repairs? Do you ever have any expenses for repairs and upkeep of equipment?

A. Why, yes. It will run about fifteen or twenty dollars a week.

Q. Now, Mr. Smith, in view of the fact that under this law you would be taxed a mileage tax of two cents per mile on your equipment, and you travelled twelve hundred miles a week, making a total tax of twenty four dollars per week [fol. 17] for the mileage tax, or practically one hundred dollars a month, or twelve hundred -ollars a year, to you believe you can stay in business under your present contract with the A. & P. Tea Company and pay that tax?

A. No, sir.

Mr. Matthews: That's all.

(Witness excused.)

The Court: Any other witnesses?

Mr. Matthews: Yes. I want to ask Mr. Cooper one other question.

Thereupon the witness L. R. Cooper was recalled to the witness stand for further cross-examination and testified as follows:

Further cross-examination.

By Mr. Matthews:

Q. Mr. Cooper, in your hauling, you have complied with the law, haven't you?

A. Yes, sir.

Q. In other words you paid your seventy five dollars and made your application?

A. Yes, got my receipt for it.

Q. So, if you are going to have to do it, you think everybody else ought to do it?

A. Absolutely.

The Court:

Q. You heard the testimony of Mr. Smith, regarding the consumption of gas and expenses attached to his hauling. Do you think that expense is fair or reasonable or too much or too little?

A. I think it's too much.

Q. The expense?

A. Oh, no, sir.

Q. You think the expenses he has enumerated——

A. I think he has hardly enough.

Q. You think it should be more than that?

A. Yes; I figure it costs me more than that to operate.

Mr. Matthews:

Q. How many miles a week to you make with your [fol. 18] truck?

A. Well, we average—taking year in and year out we average eight hundred a week.

The Court: What size truck do you operate?

A. Two and a half ton.

Q. Trailer too?

A. Yes, same kind.

Q. Mr. Cooper, you bought for hire tags the same as Mr. Smith bought?

A. Yes, sir.

Q. And besides that you had to pay this $75.00 quarterly tax?

A. Yes, sir.

Q. That's required by this last act of the Legislature?

A. Yes, sir.
Q. That's $75.00 a quarter?
A. Yes, sir.

Mr. Matthews:

Q. How much gasoline do you get—I mean, how much mileage do you get out of your truck?
A. I figure around—I don't get but seven miles.
Q. How much oil does it take for you a week—Lubricating Oil?
A. We change oil every week. Takes fifteen quarts.
Q. At fifty six cents a quart?
A. No, sir.
Q. How much per gallon?
A. Ninety cents per gallon.
Q. You pay ninety cents per gallon for yours?
A. Yes, sir.
Q. You heard Mr. Smith's testimony about his expenses and you doubt whether or not that will cover his expenses? What expense is it you have in mind that would be greater than what Mr. Smith testified?
A. I figure Mr. Smith—he says he operates his truck on about fifteen dollars a week. I figure it would take at least forty dollars.
Q. An average of forty dollars a week?
A, Yes. That is figuring in tires and tubes. Year in and year out it will run right around that. Won't miss it [fol. 19] but very little.
Q. You think that you can stay in business right on and pay this mileage tax?
A. Why no, sir, I sure don't.
Q. You know this $75.00 you paid is only just a deposit. At the end of the quarter you will have to pay mileage tax in addition to that?
A. Yes, sir.

Mr. Matthews: That's all.

(Witness excused.)

And thereupon one B. C. NAUGLE was produced as a witness on behalf of the defendant, —, being first duly sworn, testified as follows:

Cross-examination.

By Mr. Matthews:

Q. Mr. Naugle, what is your business or occupation?
A. Trucking.
Q. How long have you been in that business?
A. About ten years.
Q. Do you think that you are familiar enough with the trucking business in Florida to testify as to the average carrying capacity of trucks and the average mileage trucks make and the average charge per hundred pounds for freight and so forth?
A. I do.
Q. How many trucks do you operate?
A. Four.
Q. You operate some of yours as common carriers for the public and some of them you operate under private contract do you not?
A. About nine-tenths under private contract.
Q. What is the average carrying capacity of trucks operating in Florida?
A. Two and a half tons.

The Court: You mean the average truck?

Mr. Matthews:

Q. The average carrying capacity per truck?
[fol. 20] A. Fractory rating is what you have reference to?
Q. Most of the trucks operate, based in connection with that?
A. Yes, sir.
Q. What's the average carrying capacity of trailers?
A. Factory rating capacity, two tons; some two and a half ton.
Q. What is the average life of such equipment?
A. Three years; under good condition, might reach four.
Q. What is the average cost of a truck such as you are testifying about?

A. From forty five hundred to five thousand dollars.

Q. What is the average cost of the trailer?

A. From eight to eleven hundred dollars.

Q. What is the average cost of tires on the trucks?

A. Set of tires on the truck? *A.* A Set of tires; that includes a spare, naturally.

Q. Yes.

A. That would be about five hundred and fifty dollars.

Q. What's the average cost of a set of tires on the trailer?

A. Three hundred and twenty five dollars.

Q. What is the average life of these tires?

A. About fifteen thousand miles.

Q. What is the average gas consumption of those trucks, per gallon of gasoline?

A. About seven miles per gallon.

Q. And figuring on a mileage basis, what is the lubricating oil consumption?

A. About one quart per hundred miles.

Q. In other words every time you have gone fifteen hundred miles you have got to change oil?

A. Yes, sir.

Q. What is, if you know, the average cost of mainte-
[fol. 21] nance and repairs of such trucks? I don't mean tires now. Mechanical parts and so forth. Keeping your truck in good condition.

A. About four hundred dollars a year.

Q. Such trucks, of course, have to pay the six cents gasoline tax?

A. Yes, sir.

Q. They have to pay for the license tag for operating and the for hire tax?

A. They do.

Q. In your judgment and your opinion, do you believe it is possible for the average truckman to continue operation and pay this mileage tax?

A. It's impossible.

Q. What do you figure the average truck does a week; the number of miles per week?

A. About eight hundred.

Q. You understand that this law exempts from operation of it, all trucks engaged in the transportation of agricultural, horticultural, dairy or other farm products, fresh and salt water fish and oysters and shrimp?

A. I do.

Q. What is the difference in the damage that would be done to a road under a two and a half ton truck loaded with some of these products and one of your trucks loaded with merchandise?

A. Would be no difference.

Q. What is the—relatively speaking—the difference in the weight between a bus with a capacity of ten passengers and a truck of two and half tons capacity?

A. I believe they would be about the same.

Q. About the same?

A. About the same.

Q. Now, suppose you got to a bus with twenty passengers capacity?

A. It would be heavier than the truck.

Q. Do you know, relatively, how much heavier?

A. About four—three or four thousand pounds heavier than the truck.

Q. Then it would do the road more damage than the truck?

[fol. 22] A. Far more, relative to the additional weight and speed.

Q. Do you understand this law permits a bus carrying passengers to go forty five miles an hour?

A. Yes, sir.

Q. But holds the truckman down to the old law?

A. Yes, sir.

The Court: What is the speed for the old law?

A. Speed for the old law, I believe, is thirty miles; busses forty five.

Mr. Matthews:

Q. Under the old law the trucks and buses were under the same speed regulation?

A. Yes, sir.

Mr. Matthews: I think that's all.

(Witness excused.)

And thereupon one E. R. Brissette was produced as a witness on behalf of the defendant, —, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Matthews:

Q. Mr. Brissette, what is your business or occupation?

A. My title is Florida Manager for Mack International Motor Truck Corporation, manufacturers of Mack Trucks and Mack products.

Q. Do you know anything about trucks?

A. Yes, sir.

Q. How long have you been in that business?

A. Since 1913.

Q. Do you know of the average carrying capacity, factory rated, of trucks operating in Florida for hire?

A. Those I have sold—yes, I know.

Q. I will ask you this. Are there a good many Mack trucks in Florida?

A. Yes, sir.

Q. About how many, would you guess?

A. I couldn't make an estimate of that for the reason [fol. 23] I could tell how many have been sold, but a number have been transferred out of the State in whole fleets; the Standard Oil transferred about fifty; the Texas Company about forty. See, we sold a great deal in 1924, 1925 and 1926 that are not here today. However, I would say it runs into the hundreds.

Q. What is the average cost of those Mack trucks, complete ready for business, fully equipped.

A. You have reference to the two and a half ton truck?

Q. Yes.

A. Ranging, depending upon the truck size, whether it has a cab and a windshield on or not, and different type of body electric light or oil equipment, ranging from forty five to fifty one hundred.

Q. The average carrying capacity, according to factory rating, would be two and a half tons on most of these trucks?

A. The factory rating would be two and a half tons on most of these trucks, yes, sir.

Q. What is the average life of those trucks, per mile? Let's get it per mile first. That is, the mileage life of the truck?

A. With good care and changing the oil as per factory specifications, which on this basis is approximately weekly, run about three years. Of course—pardon——

Q. Go ahead.

A. Of course in those three years the operator of a vehicle is required to maintain that vehicle. If he does not maintain it, little things will creep into it such as loose bearings or something of that character that would cause serious damage and run the costs up in the hundreds of dollars; say five or six hundred dollars as the case may be for the bus or truck.

[fol. 24] Q. What is the usual gasoline consumption in those trucks?

A. Well, I would say we would strike an average of approximately seven miles due to the fact the people carry full trailers and there are these things to take into consideration. For example a man will be unloading in Daytona or in the busy streets here. At times drivers leave the motors running as—although he has a man up in the cab which is in compliance with the law. The man who owns his truck and is all alone, he will usually shut off his motor. That's the reason it is hard to strike an average, but approximately seven miles per gallon.

Q. What is the usual oil consumption?

Q. Well, when a truck is new, our experience has been you do not have to add any oil to it. Then you make a change of approximately once a week, which is about fourteen of fifteen quarts.

Q. Well, you wouldn't make a change until you had driven the trucks a certain number of miles?

A. No, sir.

Q. You figure on driving a truck how many miles per week?

A. About a thousand; even as high as twelve hundred.

Q. Do you know anything about the costs of a set of tires on a Mack truck?

—. The cost for tires and tubes, figuring on the average that is used by the average hauler in an- out of Jacksonville will run approximately five hundred and fifty dollars. That's replacement tires.

Q. What is the average life of such tires, based on mileage?

A. From our experience in Florida, which dates back to 1920, we figure it will run about fifteen thousand miles.

Q. For a set of tires?

A. Yes, sir.

[fol. 25] Q. Leaving off the tire expense, what do you figure the average cost of maintenance of a truck is the first, second and third years of it's life?

A. I would figure, including painting, lettering, minor repairs, inspection, which is also included in maintenance; you have to take a wheel off now and then to see that the bearings are tight; to — into the motor at times; go into the transmission; I would say for a life of a hundred and fifty thousand miles it would run right around twelve or thirteen hundred dollars.

Q. To maintain it and keep it in repair?

A. Yes, sir.

Q. What you have testified to is generally applicable to the other makes of trucks operating in Florida.

A. Approximately.

Q. Knowing what you do of the trucking business and the charges they make on regular runs and so forth, and figuring that this law imposes an additional tax in addition to all other taxes of one cent per mile on a truck and one cent per mile on a trailer, when the carrying capacity is fifty five thousand pounds—fifty five hundred pounds, which would make a total tax on the trailer and truck of two cents a mile, and a truck making an average of one thousand miles a week, that would make an average tax of twenty dollars a week or a thousand and forty dollars per year in addition to all the other taxes that they have been paying. What effect will that have upon the trucking business?

A. Considerable. It will practically eliminate the sales to this extent. The manufacturers will not be willing to sell these vehicles with a low down payment and the balance on deferred payments.

The Court: A man who operates those trucks, the amount [fol. 26] of twelve hundred dollars would considerable cut down that income wouldn't it?

A. Yes, it would; in my opinion it would prevent us from extending credit to the operators.

Mr. Matthews:

Q. That's because, in your opinion, the truck man couldn't make any money operating?

A. Yes. He couldn't buy trucks if we found he couldn't make the payments. Under this question I don't feel he could make money.

Mr. Matthews. That's all.

(Witness excused.)

And thereupon one G. J. CURREN was produced as a witness on behalf of the defendant, —, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Matthews:

Q. Mr. Curren, what is your business?
A. Truck operator.
Q. How many trucks do you operate?
A. Just one.
Q. And a trailer?
A. Yes, sir.
Q. What kind of truck is it?
A. Indiana.
Q. What's its rated carrying capacity?
A. Two and a half ton.
Q. What's the carrying capacity of your——
A. Two tons.
Q. —trailer?
A. Two tons.
Q. What is the cost of your truck, when it was new, complete, ready for business?
A. Forty two hundred dollars.
Q. What was the cost of your trailer?
A. Nine hundred dollars.
Q. About how many miles per week do you make?
A. Ten hundred and ten.
Q. Do you run over a regular route?
A. Yes, sir.
Q. What is the average life of that truck?

[fol. 27] A. Three years.

Q. How much?

A. Three years.

Q. What's the cost of a set of tires for your truck?

A. Well, approximately about five hundred dollars.

Q. What about the tires for the trailers?

A. I imagine they would run around three hundred and fifty dollars.

Q. How many miles do you get out of a set of tires?

A. We figure around fifteen thousand miles, average.

Q. How much gasoline—what is the gasoline consumption of your truck?

A. Just about seven miles per gallon.

Q. How many miles—how much oil does your truck hold?

A. Nine quarts.

Q. Nine quarts?

A. Yes, sir.

Q. How often do you have to change it?

A. Once a week.

Q. That's figured, every thousand miles you have to change it?

A. Yes, sir.

Q. What do you pay for oil?

A. Thirty five cents a quart.

The Court: You buy it by the quart or gallon?

A. By the gallon, it averages thirty five cents a quart.

Q. What is the license tag for your truck?

A. For hire.

Q. What does it cost you?

A. Costs a hundred and eight some odd dollars.

Q. You have the same kind of tag for your trailer?

A. Yes, sir.

Q. What does that cost?

A. Cost me a hundred and seventeen dollars.

Q. In addition to the tire proposition, leaving that out, what does it cost you on an average to maintain your truck and trailer and keep it in repair?

A. I figure the greasing and cleaning and all runs somewhere around about fifteen or seventeen dollars a week.

[fol. 28] Q. Do you have to have a helper with you on your truck?

A. Yes, sir.

Q. What do you pay him?

A. Fifteen dollars a week.

Q. Do you have to pay any of his expenses?

A. No, sir.

Q. What do you get per hundred pounds for hauling this freight?

A. Well, according to what point I haul it to.

Q. Just designate the points you haul to and the actual rate. Different points.

A. Well, I haul to Cocoa, fifty five cents per hundred.

Q. How many miles from here to Cocoa?

A. A hundred and sixty one. I haul to Stuart, 65¢ per hundred.

Q. How far is it to Stuart?

A. Two hundred and forty nine miles.

Q. Two hundred and forty nine miles?

A. Yes, sir; Green Cove Springs, 25¢ per hundred; Crescent City, 35¢ per hundred.

Q. Give the mileage to Green Cove Springs?

A. Twenty six to Green Cove Springs; eight- four to Crescent City.

Q. You make a trip to these places once a week?

A. Yes, sir.

Q. Each one of them?

A. Yes, sir.

Q. I will ask you, knowing the truck business—how long have you been in the truck business?

A. Operating myself about six months.

Q. How long had you been operating one before you went out for yourself?

A. Close on to three years.

Q. Knowing what it cost you to operate a truck and all the other taxes you have to pay, and the gross income you get from it, do you think you will be able to continue to operate if you have to pay this tax of one cent per mile on your [fol. 29] truck and one cent per mile on the trailer?

A. I know I can't.

The Court: Mr. Curren, do you always go out with a capacity load?

A. No, sir, not all the time.

Q. It cost- just about the same to operate a half a load as it does a full load?

A. Yes, sir, approximately the same; very little difference.

Q. You are paid by the hundred weight?

A. Yes, sir.

Q. If you only had half a load, you would be the loser?

A. Yes, sir.

The Court: That's all.

Mr. Matthews: That's all.

(Witness excused.)

Mr. Matthews (addressing Mr. Smith): Mr. Smith, in going out with your hauling, do you always go with a capacity load?

A. No.

Q. Full load?

A. No, sir.

Q. Suppose you only had half a load?

A. I would have to go just the same.

Q. In other words you have to go for the A. & P. Company whether you got a sack of flour or whether you got five tons of stuff?

A. Yes, sir.

Q. Got to go?

A. Yes, sir, got to go or get out one.

Mr. Matthews: That's all.

MOTION TO DISMISS

Mr. Matthews: We now move the Court to dismiss this defendant upon the following grounds:

1. The evidence fails to show any violation of any valid law of the State of Florida.

2. That Chapter 13700, Laws of Florida, 1929, under which this prosecution is brought, is invalid, null, void and unconstitutional.

A. Because said legislation denies the defendant his [fol. 30] rights of acquiring, possessing and protecting his

property, guaranteed to him by Section One of the Declaration of Rights of the Constitution of the State of Florida.

B. Because the said Act undertakes to deprive the defendant of his property without due process of law, in violation of Section Twelve of the Declaration of Rights of the Constitution of the State of Florida and the Fourteenth Amendment of the Constitution of the United States.

C. Because the legislation is arbitrary, unreasonable and constitutes an unreasonable classification in violation of the Constitution of the State of Florida and of the United States.

D. Because said act denies to the defendant, the equal protection of the laws as guaranteed to him by Section One of the Declaration of Rights of the Constitution of the State of Florida and the Fourteenth Amendment of the Constitution of the United States.

E. Said Act would deprive the defendant of his liberty without due process of law, guaranteed to him by the Constitution of the State of Florida and the United States.

F. Because said tax attempted to be imposed upon the defendant, and all who are similarly situated, is arbitrary, unreasonable, discriminatory and amounts to confiscation.

G. Said Act does not apply to all who are similarly situated alike.

H. Said Act impairs the obligation of a contract between the State of Florida and also between the defendant and those with whom he has contracted to do hauling, in violation of Section Seventeen of the Declaration of Rights of the Constitution of the State of Florida and Section Ten of Article One of the Constitution of the United States.

[fol. 31] I. Said Act violates Sections Twenty and Twenty One of Article Three of the Constitution of the State of Florida in that it imposes a tax for the specific purpose of revenue and not for regulation and should therefore apply to all trucks trailers and busses alike, or should be based on some reasonable classification.

J. Said Act violates Sections One and Five of Article Nine of the Constitution of Florida in that it attempts to im-

pose a tax which is not a license tax and is not an ad valorem tax, but a mileage tax.

K. The Said Act violates Section two of Article Nine of the Constitution of Florida in that the levy of the said tax is not for a current expense of the State.

L. Said Act violates Section Three of Article Nine of the Constitution of Florida because the levy of such tax is not in pursuance of law.

M. Said Act violates Section Four of Article Nine of the Constitution because the appropriation attempted to be made is not in pursuance of law and is illegal, null and void.

N. Said Act violates Section Six of Article Nine of the Constitution of the State of Florida because the legislature cannot levy a tax or appropriate State money for the use of paying the principal or interest in whole or in part of County bonds, as said act attempts to do.

O. Said Act violates Section Five, Article Nine, of the Constitution of Florida, because said Section prohibits the legislature from levying a County tax.

P. Said Act violates Section Sixteen, Article Three of the Constitution of the State because it contains more than one subject, and matter properly connected therewith, and the subject matter of the act is not briefly expressed in the title.

[fol. 32] Q. Said Act violates Section Thirty of Article Three of the State Constitution because it makes appropriations and contains provisions on other subjects which is prohibited by said Section.

R. Said Act Violates Section Thirty of Article Sixteen of the State Constitution in that it attempts to regulate, not only common carriers, but all persons who may be engaged in the business of transporting property for compensation which is prohibited by said Section.

S. The legislature is prohibited by the Constitution from making a private carrier or a private contract hauler a common carrier.

T. The tax attempted to be imposed is not authorized by the Constitution of the State of Florida.

U. S[illegible]d Act is *so* vague, uncertain, indefinite and in the alternative in that it does not constitute a law within the meaning of the Constitution of the State of Florida.

V. Said act attempts to levy a toll per mile for the use of public roads for the purpose of transporting freight for compensation and many of the roads over which the defendant hauls are Federal Aid Roads and the imposition of such tolls is in violation of the Statutes of the United States with reference to Federal Aid Roads.

Mr. Matthews: I realize it's not proper for this Court to declare a law unconstitutional. I simply put it in the record at this time to preserve the record.

The Court: The Legislature of 1929 passed the Act on which this warrant is drawn and this Court has no right to declare such act unconstitutional, and this Court only has probable cause for its jurisdiction, therefore I will hold [fol. 33] Mr. Smith for Criminal Court under a five hundred dollar bond.

Thereupon the hearing adjourned.

[File endorsement omitted.]

IN CIRCUIT COURT OF DUVAL COUNTY

WRIT OF HABEAS CORPUS AND RETURN—Filed Sept. 5, 1929

STATE OF FLORIDA,
County of Duval:

To W. B. Cahoon, Sheriff of Duval County, Florida:

You are hereby commanded to have the body of E. S. Smith, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention before the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida, at 3 P. M. o'clock on the 26 day of August, A. D. 1929, after being served with this writ to be dealt with according *ot* law, and have you then and there this writ together with your return thereon of your doings in the premises.

Witness my hand this the 21st day of August, 1929.

DeWitt T. Gray, Judge.

[fol. 34] (Endorsed)

Received this writ on the 21st day of August, A. D. 1929, and executed the same on the 26th day of August, A. D. 1929, having the body of the within named E. S. Smith now before the Court, as herein commanded, said E. S. Smith being held by the undersigned under and by virtue of a warrant issued out of the Eleventh Justice of the Peace Court of Duval County, Florida, charging him with the offense of violation of Chapter 13700, Laws of Florida, 1929, and by reason of a committment by the Justice of the Peace of the said Court, said Justice having found probable cause and having committed the said E. S. Smith for trial in the Criminal Court of Record in and for Duval County, Florida. Said committment is exhibited herewith.

W. B. Cahoon, Sheriff Duval County, by Frank A. Edwards, Deputy Sheriff.

[File endorsement omitted.]

[fol. 35] IN JUSTICE OF PEACE COURT

THE STATE OF FLORIDA

vs.

E. S. SMITH

COMMITMENT—Filed in Circuit Court Sept. 5, 1929

In the name of the State of Florida, to the Sheriff or any Constable of said County:

Whereas L. R. Cooper has this day made oath before me, in writing, that one E. S. Smith on the 19th day of Aug., 1929, in the County and District aforesaid, E. S. Smith was owning and operating, or controlling, or managing two motor propelled vehicles, not usually operated on or over rails, but operated upon the public highways of the State of Florida, in said District and County, said vehicles being a truck of two and one-half tons capacity, and a trailer of two and one half tons capacity, and he used said motor vehicles in the business of transporting property for compensation

over public highways in the State and between fixed termini and over regular routes, such routes being from Jacksonville to Melbourne and return on Monday, from Jacksonville to Titusville and return on Wednesday, from Jacksonville to Fernandina and return on Thursday morning, from Jacksonville to Vero Beach and from there to Ft. Pierce, leaving Jacksonville every Thursday afternoon, and returning to Jacksonville, on Friday. Said trips are made each week. The said Smith has not made any application for certificate of public convenience and necessity, and he has not received from the Railroad Commission of the State of Florida, a certificate that the present or future public convenience and necessity requires, and will require, such operation. The said Smith has not paid to the Comptroller $150.00 as an advance payment upon mileage tax required [fol. 36] and levied for the operation of said vehicles, all of which is a violation of Chapter 13700, Laws of The State of Florida, 1929, and *and* whereas it appeared to me from an examination that there was just reason to believe that the said defendant was guilty of such offense, and the said defendant, on being brought before me on a warrant, was required to enter a recognizance, with sufficient security, in the sum of Five Hundred dollars, to appear at the next term of the Criminal Court to be held in and for said County, and not to depart same without leave, and the said defendant having refused to find such security:

You are hereby commanded forthwith to convey the said defendant to the common jail of said County, and to deliver him to the keeper thereof, who is hereby required to receive the said defendant into his custody in the said jail, and to keep him safely there until he shall find security or be thence discharged by due course of law.

Given under my hand and seal this 21st day of August, A. D. 1929.

M. B. Craig, Justice of the Peace, Eleventh District.
(Seal.)

[File endorsement omitted.]

[fol. 37] [File endorsement omitted]

IN CIRCUIT COURT OF DUVAL COUNTY

10475-L

E. S. SMITH

vs.

W. B. CAHOON, as Sheriff

Habeas Corpus

JUDGMENT—Filed Sept. 5, 1929

This cause coming on to be heard upon the petition of E. S. Smith, for Writ of Habeas Corpus, and his petition for discharge, and upon the return of the Sheriff as to the said Writ that he is holding the said Petitioner in custody by reason of a warrant issued out of the Justice of the Peace Court of the Eleventh Justice of the Peace District in and for Duval County, Florida, and the committment from said Court committing the prisoner to the trial before the Criminal Court of Record in and for Duval County, Florida, upon a charge of violating the provisions of Chapter 13700, Laws of Florida, 1929.

The prisoner is charged specifically with having operated a truck and trailer over the public highways in said District in Duval County, Florida, for compensation, and without having made application for a certificate of public necessity and convenience, and without having received any such certificate, and without having paid the advance deposit on account of the tax imposed in and by said Act.

The hearing was had before the Justice of the Peace, and the testimony taken at such hearing is attached to the Peti- [fol. 38] tion, and made a part thereof. There is no dispute as to the facts in this case. It appears that the Petitioner operates a truck and trailer under private contract with one concern to do all of its hauling between certain designated fixed termini. He makes these trips regularly each week. He is required to go for the firm (Min. 39, page 378) with which he has contracted, whether this firm has a full load of merchandise or not. He does not hold himself

out to the public as a common carrier, does not now haul for the public generally, and never has hauled for the public generally. The testimony shows that on numerous occasions he had actually refused to haul freight for others, even though he was returning to Jacksonville empty. These facts show the Petitioner to be a private carrier, and not a common carrier.

Petitioner attacks the constitutionality of the law on many grounds, among them being that the act violates the provisions of Sections 1 and 12 of the Declaration of Rights of the Constitution of the State of Florida, and the Fourteenth Amendment to the Constitution of the United States in that the Act would deprive Petitioner of he right of acquiring, possessing and protecting his property, and would deprive Petitioner of his property without due process of law. It is the contention of the Petitioner that it is beyond the power of the Legislature to convert or transmute him into a common carrier by legislative fiat, or to require a private carrier to assume the duties, burdens and obligations, and become subject to the same rules and regulations as a Common carrier.

In the case of Michigan Public Utilities Co. vs, Duke, 36 A. L. R. 1105, decided by the Supreme Court of the United [fol. 39] States, it was held that it was beyond the power of the Legislature, by legislative fiat or legislative command, to make a private carrier become a common carrier, and that such legislation violated the due process clause of the Fourteenth Amendment of the Constitution of the United States. In this case, the Legislature of Michigan attempted, in so many words, to define all transportation companies transporting persons or property for hire by motor vehicles as being common carriers. This the Supreme Court of the United States said could not be done.

Min. 39, page 379:

In a later case, from California, Frost and F. Trucking Co. vs. Railroad Commission, 240 Pacific, page 26, the Act, as amended in 1919 was very similar to the Act now before the Court. The Legislature attempted to place all carriers for compensation under the jurisdiction of the Railroad Commission, and in the same Act, gave the Railroad Com-

mission practically the identical powers that the Act now before the Court gives to the Railroad Commission of Florida. The main difference between the Michigan law and the California law is that the Michigan law attempts to define all carriers as common carriers, whereas the California law attempts to subject all carriers for compensation to the same duties, liabilities, rules, regulations and burdens as common carriers. The Supreme Court of California sustained the validity of the Act, and held that it was competent for the Legislature to make a conditional offer to a person or corporation to the effect that if such person or corporation desired to use the public highways for transporting property for hire, such person or corporation should dedicate his property to the quasi public use of transportation, or at least submit himself or itself to [fol. 40] the conditions, regulations and restrictions specified in the Act. These conditions, regulations and restrictions specified in the Act almost identical with those in the Act now before the Court, and are such as are only applicable to common carriers.

An appeal was taken to the Supreme Court of the United States in the Frost case 47 A. L. R., 458-70 L. ed. 1101, and that Court reversed the opinion and decision of the California Court. The Supreme Court of the United States, in reversing this case, said:

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the State (Min. 39, page 380) threatens otherwise to withold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender

of one constitutional right as a condition of its favor, it [fol. 41] may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. * * *"

This decision from the Supreme Court of the United States taken in connection with the Duke case, is the supreme law of the land, and is conclusive upon this question. It is beyond the power of the Legislature by legislative fiat or command, to transmute a private carrier into a common carrier, and it is likewise beyond the power of the Legislature to accomplish this forbidden purpose by making a private carrier for hire submit to all of the rules, regulations and burdens of a common carrier in order to do business. See also Hissem vs. Guran, 146 N. E., 808, and Purple Truck Garage Co. vs. Campbell, 51 A. L. R. 816.

It was urged, however, that notwithstanding the fact that this Act now before the Court gives to the Railroad Commission the power to regulate rates, fares, schedules, routes to be travelled, to grant or refuse a permit to do business, to fix the time of departure and arrivals, and the power to make such other rules and regulations as are applicable only to common carriers, the Railroad Commission has not in fact attempted to exercise all of the power conferred upon it by the Act as it relates to private carriers. However, that is not the test of the constitutionality of a law.

[fol. 42] Min. 39, page 381:

In the case of Purple Truck & Garage Co. vs. Campbell, supra, it was held:

"In ascertaining the judicial value of a statute in litigation in which it is involved, it is necessary to consider nor what actually has been done under it, but what it authorizes and permits to be done."

It is, therefore, the opinion of the Court that Chapter 13,700, Laws of Florida, 1929, violates Sections 1 and 12 of the Declarations of Rights of the Constitution of the State of Florida, and the Fourteenth Amendment of the

Constitution of the United States, in so far as the same relates to private carriers for compensation.

Having reached this conclusion, the next question is whether or not this holding makes the entire law unconstitutional. In Section 18 of the Act, it is provided:

"Section 18. If any section, sub-section, sentence, clause or phrase of this law is for any reason held unconstitutional, such decision shall not affect the validity of the remaining portions of this law. * * *"

It therefore appears that this opinion of the Court does not affect the validity of the Act as it relates to common carriers.

A number of other constitutional objections were raised by the Petitioner, but the Court having reached the conclusion above set forth, it is unnecessary to decide the other questions presented.

It is therefore considered, ordered and adjudged that the Petitioner, E. S. Smith, be and he is hereby discharged from custody, and

It is further ordered that the cost of this proceeding be [fol. 43] taxed against Duval County.

Done and ordered in chambers this the 5th day of September, A. D. 1929.

DeWitt T. Gray, Judge.

[File endorsement omitted.]

In Circuit Court of Duval County

Ex Parte E. S. Smith

Petition of the Attorney General for Allowance of Writ of Error—Filed Sept. 9, 1929

To the Honorable De Witt T. Gray, Judge of the above Court:

Now comes the State of Florida, by Fred H. Davis, its Attorney General, and shows unto your Honor that the said State of Florida is aggrieved by the judgment heretofore entered in this proceeding on the 5th day of Sep-

tember, 1929 wherein and whereby it was ordered and adjudged that the petitioner, E. S. Smith, be discharged from [fol. 44] the custody of the respondent, W. B. Cahoon, as Sheriff of Duval County, Florida, under the cause of detention specified in the said sheriff's return to the writ of habeas corpus issued in this cause, and in accordance with Section 3580, Revised General Statutes of Florida (Section 5444, Compiled General Laws, 1927) prays that Your Honor, the Judge hearing said cause, shall grant to The State of Florida in the name of the respondent, W. B. Cahoon, as Sheriff of Duval County, Florida, a writ of error to the said judgment of this court entered September 5th, 1929, and that said writ of error be made returnable before the Supreme Court of the State of Florida on Monday, October 14th, 1929, pursuant to law and the course of procedure in such cases made and provided.

Filed this September 9th, 1929.

Fred H. Davis, Attorney General of the State of Florida.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

W. B. CAHOON, as Sheriff of Duval County, Florida, Plaintiff in Error,

vs.

E. S. SMITH, Defendant in Error

Writ of Error in Habeas Corpus Case.—Writ of Error to Judgment of Court Discharging Petitioner in Habeas Corpus Case

Copy of Proposed Assignment of Errors

[fol. 45] Now comes the plaintiff in error, W. B. Cahoon, as Sheriff of Duval County, Florida and says that in the judgment of the Circuit Court of Duval County, Florida rendered on the 5th day of September, 1929, whereby the defendant in error, E. S. Smith, was ordered discharged from custody under the warrant of detention there exhibited, manifest error hath happened to the great prejudice of plaintiff in error and the State of Florida, where-

fore plaintiff in error prays that said judgment may be reversed by the Supreme Court of Florida for the Following specifications of error, to-wit:

First Assignment of Error

The Court erred in ordering the discharge of the prisoner, E. S. Smith, from custody under the cause of detention certified to the Court.

Second Assignment of Error

The Court erred in holding Chapter 13700 Acts of 1929, unconstitutional in whole or in part as specified in the final judgment.

Filed this September 9th, 1929.

Fred H. Davis, Attorney General of the State of Florida.

[File endorsement omitted.]

[fol. 46] [File endorsement omitted.]

In Circuit Court of Duval County

[Title omitted]

Order Allowing Writ of Error—Filed Sept. 9, 1929

Upon petition of Fred H. Davis, Attorney General of the State of Florida, who applies therefor in behalf of the said State in the name of the respondent W. B. Cahoon, as Sheriff of Duval County, Florida, and in accordance with section 3580 Revised General Statutes of Florida, it is hereby ordered by the Court that a writ of error is hereby allowed to the Supreme Court of the State of Florida from the judgment heretofore entered in this cause on the 5th day of September, 1929 whereby the prisoner, E. S. Smith, was ordered discharged from custody of the respondent, W. B. Cahoon, as Sheriff of Duval County, Florida, under the warrant of detention exhibited by him, which writ of error shall be made returnable to the Supreme Court of the State of Florida on Monday, October 14th, 1929, together with a

transcript of the record of the proceedings had herein, and [fol. 47] it is ordered that the Clerk of the Circuit Court of Duval County, Florida, forthwith issue and record said Writ of Error in the minutes of this Court where the judgment is recorded, and that he likewise cause to be issued a scire facias audiendum errores to be executed upon the defendant in error, E. S. Smith, as provided by law.

Done at Jacksonville, Florida, this September 9th, 1929,

DeWitt T. Gray, Judge Circuit Court.

[File endorsement omitted.]

IN SUPREME COURT OF FLORIDA

W. B. CAHOON, as Sheriff of Duval County, Florida, plaintiff in Error,

vs.

E. S. SMITH, Defendant in Error

[fol. 48] ASSIGNMENT OF ERRORS—Filed in Circuit Court Sept. 9, 1929

Now comes the plaintiff in error, W. B. Cahoon, as Sheriff of Duval County, Florida and says that in the judgment of the Circuit Court of Duval County, Florida rendered on the 5th day of September, 1929, whereby the defendant in error E. S. Smith, was ordered discharged from custody under the warrant of detention there exhibited, manifest error hath happened to the great prejudice of plaintiff in error and the State of Florida, wherefore plaintiff in error prays that said judgment may be reversed by the Supreme Court of Florida for the following specifications of error, to-wit:

First Assignment of Error

The Court erred in ordering the discharge of the prisoner, E. S. Smith, from custody under the cause of detention certified to the Court.

Second Assignment of Error

The Court erred in holding Chapter 13,700 Acts of 1929, unconstitutional in whole or in part as specified in the final judgment.

Filed this September 9th, 1929.

Fred H. Davis, Attorney General of the State of Florida.

[File endorsement omitted.]

[fol. 49] In Circuit Court of Duval County

Writ of Error—Filed Sept. 9, 1929

The State of Florida to the Judge of the Circuit Court of the Fourth Judicial Circuit of the State of Florida, Greeting:

Because in the record and proceedings, and also in the rendition of judgment in a cause that was prosecuted in the Circuit Court held at Jacksonville, within and for the County of Duval, on the 5th day of September, A. D. 1929, between E. S. Smith, Petitioner, and W. B. Cahoon, as Sheriff of Duval County, Florida, as Respondent, manifest error hath happened as it is said; to the great damage of the said W. B. Cahoon, as Sheriff of Duval County, Florida, as by his complaint appears.

We, willing that the error, if any hath been, should be duly amended and full and speedy justice done therein to the said parties, do command you that, if the judgment be therein rendered, you distinctly and openly send us the record and process of the suit aforesaid, with all things touching them, under your seal, together with this Writ, so that we may have them before our Justices of our Supreme Court of the State of Florida, to be held at Tallahassee, on the 14th day of October, A. D. 1929, that, inspecting the record and process aforesaid, we may, for correcting that error therein, cause further to be done what of right and according to law ought to be done.

Witness the Hon. Glenn Terrell, Chief Justice of said Supreme Court, and the seal of the Circuit Court of Duval

county, Fourth Judicial Circuit of Florida, at Jacksonville, this 9th day of September A. D. 1929,

Frank Brown, Clerk Circuit Court of Duval County, Fourth Judicial Circuit of Florida, by R. E. Wil-
[fol. 50] liams, Deputy Clerk. (Court Seal.)

[File endorsement omitted.]

(Endorsed.)

STATE OF FLORIDA,
County of Duval:

Be it remembered, that on this 9th day of September, A. D. 1929, I, Clerk of the Circuit Court in and for said County, have duly recorded the foregoing instrument in the public records of said County in Minutes of the Circuit Court, Book No. 39 on Page 392.

In witness whereof I have hereunto set my hand and the seal of said Court, this day and year above written.

Frank Brown, Clerk, by R. E. Williams, Deputy Clerk.

[File endorsement omitted.]

[fol. 51] IN CIRCUIT COURT OF DUVAL COUNTY

[Title omitted]

WRIT OF SCIRE FACIAS AND RETURN—Filed Oct. 2, 1929

To E. S. Smith, Greeting:

Whereas, W. B. Cahoon, as Sheriff of Duval County, Florida, plaintiff in error in the above styled cause has sued out writ of error in the Circuit Court made returnable, at Tallahassee, Florida, on the 14th day of October A. D. 1929, in a cause in which the plaintiff in error was charged with unlawful imprisonment and a verdict of guilty of unlawful imprisonment was rendered against plaintiff in error;

Therefore, This is to give you notice that the record in this case and the errors assigned will be presented to the Supreme Court of Florida, there to receive whatever order

and judgment that honorable court shall in this case deem just, and have you there this writ.

Witness the Honorable Glenn Terrell, Chief Justice of the said Supreme Court, and the seal of the said Circuit Court, this the 9th day of September, A. D. 1929.

Frank Brown, Clerk Circuit Court Duval County, Florida, by R. E. Williams, Deputy Clerk. (Court Seal.)

(Endorsed.)

Received this writ on the 10th day of September, A. D. 1929, and executed same on the 12th day of September A. D. 1929, in Duval County, Florida, by delivering a true copy [fol. 52] thereof to John E. Mathews, Attorney in Records for the within named Defendant E. S. Smith, and at the same time exhibiting this original writ and explaining the contents thereof.

W. B. Cahoon, Sheriff Duval County, Florida, by T. L. Lamb, Deputy Sheriff.

1 s.	1.50
2 m.	.25
	1.75

[File endorsement omitted.]

[fol. 53] IN CIRCUIT COURT OF DUVAL COUNTY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Sept. 9, 1929

To the Honorable Frank Browk, Clerk of the above Court:

You are hereby requested to make up a complete transcript of the record in the above cause, so that the same may be ready for filing in the Supreme Court of Florida on on the return day of the writ of error issued in this cause. You will include in full in said transcript of the record:

1. Petition for writ of habeas corpus with all exhibits.

2. Writ of habeas corpus.
3. Return of Sheriff on Writ of Habeas Corpus.
4. Judgment of Court discharging prisoner dated Sept. 5, 1929.
5. Petition for Allowance of Writ of Error.
6. Order of Court allowing writ of error and fixing return day.
7. Writ of Error, as issued and recorded, showing record and place in minute book where same may be found.
8. Scire Facias ad audidendum errores, showing service thereof or waiver of such service as case may be.
9. Complete Assignment of Errors filed by plaintiff in Error.
10. This præcipe with directions therein contained.
[fol. 54] 11. All papers showing service of copy of assignment of errors, and of copy of this præcipe.
12. And attach thereto a Clerk's certificate in the from prescribed by Rule 103 of the Supreme Court.

Filed this September 9th, 1929.
Fred H. Davis, Attorney General, Counsel for Plaintiff in Error.

I, John E. Mathews, attorney for E. S. Smith, defendant in error, on behalf of said defendant in error, hereby acknowledge due and timely service upon me of a true copy of the foregoing directions and præcipe for making up transcript of the record and also acknowledge due and timely service upon me of a true copy of the plaintiff in error's complete assignment of errors filed in connection with his writ of error taken in this cause.
This September 9th, 1929.
John E. Mathews, Attorney for Defendant in Error.

[File endorsement omitted.]

[fol. 55] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 56] Minute entry of argument and submission February 14, 1930, omitted in printing.

[fol. 57] IN SUPREME COURT OF FLORIDA

W. B. CAHOON, as Sheriff, Plaintiff in Error,

vs.

E. S. SMITH, Defendant in Error

Duval County—Habeas Corpus

OPINION—Filed May 21, 1930

WHITFIELD, P. J.:

This writ of error was allowed and taken under the statute to a final order discharging the petitioner in habeas corpus proceedings. Section 5444, Compiled General Laws 1927; State v. Bethea, 61 Fla. 60, 55 So. 550; Hiers v. Mitchell, 95 Fla. 345, 116 So. 81.

It appears that E. S. Smith owned and operated two motor propelled vehicles in the business of transporting property for compensation upon the public highways between fixed termini and over regular routes, all within the State, not as a common carrier but as a private carrier under special contract; that he has not made application for or received a certificate of public convenience and necessity, and has not paid to the Comptroller an advance payment upon the mileage tax required by Chapter 13700, Laws of Florida 1929, and that such failure being a misdemeanor under the statute, the said E. S. Smith had been committed to the custody of the sheriff for trial but was discharged on habeas corpus, the Circuit Judge holding Chapter 13700 cannot be constitutionally applied to the facts of the case. [fol. 58] The statute entitled

"An act providing for the Supervision and Regulation of Persons, Firms, Corporations and Associations Owning, Controlling, Operating or Managing Motor Vehicles Used in the Business of Transporting Persons or Property for Compensation Over the Pubic Highways of the State; Defining Auto Transportation Companies and Providing Supervision and Regulation Thereof by the Railroad Commission of the State of Florida and Providing for the Enforcement of the Provisions of This Act and for the Punish-

ment of Violations Thereof and Imposing a Mileage Tax and Providing for the Disposition of the Revenue Raised by the Same; and Repealing All Acts Inconsistent with the Provisions of this Act,"

provides that

"The term 'auto transportation company' when used in this Article means every corporation or person, their lessees, trustees or receivers, owning, controlling, operating or managing any motor-propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route: Provided, that the term 'auto transportation company' as used in this Article, shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm [fol. 59] products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point enroute to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products."

"No auto transportation company shall operate any motor vehicle for the transportation of persons or property for compensation on any public highway in this State without first having obtained from the railroad commission a certificate that the present or future public convenience and necessity requires or will require such operation, but no certificate shall be required for operation exclusively within the limits of an incorporated city or town."

"There shall be collected by the Comptroller of the State from every auto transportation company as herein defined to which has been granted a certificate of public convenience and necessity permitting it to engage in the transportation of passengers or freight, or both, a mileage tax of one-half cent per mile on all busses with a capacity of 10 passengers or less and a mil-age tax of three-fourths cent per mile on all busses with a capacity of not more than 20 passengers nor less than 10 passengers, and a mileage tax of one cent

per mile on all busses of the capacity of more than 20 passengers; and a mileage tax of one cent per mile on all trucks with a loaded capacity of less than 5,500 lbs., and a tax of two cents per mile on all trucks with a loaded capacity of 5,500 lbs., or more coming within the terms of this Article for every mile traveled by the motor vehicles of [fol. 60] such auto transportation company over the public highways of this State. This tax shall be paid quarterly beginning October 1, 1929: Provided, that at the time of issuing said certificate of public convenience and necessity and at the beginning of each calendar quarter thereafter the Comptroller of the State shall collect from each holder of such certificate the sum of seventy-five dollars as an advance payment upon the mileage tax herein levied for the ensuing quarter which said amount shall at the end of the quarter be credited to said holder of such certificate and the difference between the said amount and the correct amount of said tax shall be adjusted by the Comptroller with the said holder of such certificate."

Sections 1, 2, 13, 14, Chapter 13700, Acts 1929, sections 1335 (1), 1335 (2), 1335 (13), 7794 (2), Supplement to Compiled General Laws 1927.

The title of the Act does not express, and the body of the Act does not embrace, more than one general subject of legislation and matter properly connected therewith therefore the Act does not violate section 16 of Article III, constitution. The title of the Act is not misleading. The tax levy is matter properly connected with the subject of the regulation of the business that is expressed in the title and covered by the statute, and the levy need not be confined to expeness of regulation. Liberty Highway Co. v. Michigan, 294 Fed. 703.

The statute applies to corporations and persons who use motor propelled vehicles in the business of transporting persons or property for compensation over public highways in this State between fixed termini or over a regular route, whether such transportation for compensation is as [fol. 61] common carriers or as carriers for particular persons under special contract; but the statute does not require private carriers to become common carriers and the

provisions of the statute that are legally applicable only to common carriers are not intended to be applied to and are not applicable to corporations or persons who are not common carriers, though engaged in the transportation to which the statute refers; and the provisions of the statute that are legally applicable to private carriers for compensation, are capable of being effectuated, leaving the provisions that are legally applicable only to common carriers to be applied to such common carriers as are covered by the statute. This does not violate the pertinent principles that are announced in Mich. Pub. Utilities Co. v. Duke, 266 U. S. 570, 45 Sup. Ct. 191, 69 Law Ed. 445, 36 A. L. R. 1105; Frost v. R. R. Comm. of Cal., 271 U. S. 583, 46 Sup. Ct. 605, 70 Law Ed. 1101, 47 A. L. R. 457. The requirements as to procuring certificates of convenience and necessity for doing the business on the highways and as to the tax imposed on the business may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State, in the exercise of the police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes.

The "mileage tax" levied by the statute is a license tax imposed upon the intrastate business of transportation for compensation on the public roads of the State; and being a license tax imposed upon the business by statute for public purposes, it is not in law or in fact a "toll" collected for vehicular passage over the roads, it not being collected for mere passage over the roads or "exacted when and as the privilege of passage is exercised." Carley & Hamilton v. Snook, — U. S. —, 50 Sup. Ct. 204, — Law Ed. —, February 24, 1930. A mileage tax was sustained in Interstate Busses Corp. v. Blodgett, 19 Fed. (2nd) 256, 276 U. S. 245, 48 Sup. [fol. 62] Ct. 230, 72 Law Ed. 551. The mileage tax is "in lieu of all other taxes and fees * * * except ad valorem taxes and registration license taxes" etc., section 14, Chapter 13700. The essential nature of the tax as a license tax on a commercial business is not altered by the circumstance that the license tax is calculated according to road miles that are covered in carrying on the business of intrastate commerce. The tax is laid on the business, not on the mere passage over the highways. Even if the "mile-

age tax" as here imposed may be regarded as a "toll" under the Federal Highway Act, it is not shown that the petitioner operates only upon highways that have been "constructed or reconstructed" under the Federal Act. The State law is operative upon State highways when not in conflict with applicable dominant Federal authority. See Carley v. Snook, — U. S. —, 50 Sup. Ct. 204, — Law Ed. —; Bekins Van Lines v. Riley, — U. S. —, 50 Sup. Ct. 64, — Law Ed. —; Iowa Motor Vehicle Assn. v. Board, — Iowa —, 221 N. W. 364; Williams v. Riley, — U. S. —, 50 Sup. Ct. 63, — Law Ed. —.

There are excepted from the operation of the statute

"corporations or persons engaged exclusively in the transportation of children to and from school, or any transportation company engaged exclusively in transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point enroute to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products."

The exception as to "transporting or delivering dairy products" has reference to transporting dairy products to the primary market from the point of production. Such exceptions have a reasonable basis for just distinctions and do not make the statute operate arbitrarily upon some and [fol. 63] not upon others under practically similar conditions. State v. Le Febvre, — Minn. —, 219 N. W. 167. The organic provision as to equal protection of the laws forbids unjust discriminations, but it does not forbid just and reasonable distinctions and classifications and it does not require absolute and entire equality and uniformity of application in sovereign regulations. The tax provisions do not appear on their face and are not clearly shown to be so unreasonable and arbitrary in amount as to be an abuse of legislative power.

The petitioner has no interest in the statutory disposition of the taxes imposed on his business; and even if the disposition made of such taxes by section 15 of Chapter 13700 be invalid, section 18 of the Act provides for an alternative disposition that is not challenged.

Reversed.

Strum and Buford, JJ., concur.

Terrell, C. J., and Ellis and Brown, JJ., concur in the opinion and judgment.

[fol. 64] IN SUPREME COURT OF FLORIDA

W. B. CAHOON, as Sheriff of Duval County, Plaintiff in Error,

vs.

E. S. SMITH, Defendant in Error

A Writ of Error to the Circuit Court for Duval County

JUDGMENT—May 21, 1930

This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is error in the said judgment; it is, therefore, considered, ordered and ad-

[fols. 65 & 66] judged by the Court that the said judgment of the Circuit Court be and the same is hereby reversed; it is further ordered by the Court that the plaintiff in error do have and recover of and from the defendant in error his costs by him in this behalf expended, which costs are taxed in the sum of $—, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice Whitfield was this day ordered to be filed.

[fols. 67 & 68] Petition for rehearing, covering two pages, filed June 20, 1930, omitted from this print. It was denied and nothing more by order July 8, 1930.

[fols. 69 & 70] IN SUPREME COURT OF FLORIDA

[Title omitted]

ORDER DENYING REHEARING—July 8, 1930

A petition for rehearing having been filed in this cause and same having been duly considered it is ordered by the

Court that the said petition be and the same is hereby denied.

[fol. 71] IN SUPREME COURT OF FLORIDA

MANDATE—July 8, 1930

The State of Florida to the Honorable the Judge of the Circuit Court for the Fourth Judicial Circuit of Florida, Greeting:

Whereas, Lately in the Circuit Court of the Fourth Judicial Circuit of Florida, in and for the County of Duval, in a cause wherein E. S. Smith was plaintiff and W. B. Cahoon, as Sheriff of Duval County, was defendant, the Judgment of said Circuit Court was rendered September 5th, 1929, as by the inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the State of Florida, by virtue of a writ of error, agreeably to the laws of said State in such case made and provided, fully and at large appears;

And whereas, at the January Term of said Supreme Court holden at Tallahassee, A. D. 1930, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the 21st day of May, A. D. 1930, it was considered by said Supreme Court that the said Judgment of the Circuit Court be and the same is hereby reversed; it is further ordered by the Court that the costs in this behalf expended be and the same are hereby taxed against the defendant in error, which costs are taxed at the sum of — Dollars;

[fols. 72 & 73] Therefore you are hereby commanded, That such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had, the said Judgment of the Circuit Court notwithstanding.

Witness the Honorable Glenn Terrell, Chief Justice of said Supreme Court, and the Seal of said Court, at Tallahassee, this 8th day of July, 1930.

G. T. Whitfield, Clerk Supreme Court of Florida.
(Seal.)

—— —, 19—. Original mailed to Clerk of Court for —— County.

[fol. 74] IN SUPREME COURT OF FLORIDA

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed Aug. 14, 1930

Petition for Appeal

Considering himself aggrieved by the final decision of the Supreme Court of the State of Florida in the above entitled cause, the appellant herein, E. S. Smith, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond therein, and for supersedeas.

Assignment of Errors

And the said E. S. Smith assigns the following errors in the record and proceedings in the said cause:

1. The Supreme Court of the State of Florida erred in holding and deciding that the statute of the State of Florida, known as Chapter 13700, Laws of Florida, 1929, is not repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States in that in and by such statute the State of Florida seeks to deny to appellant the equal protection of the laws, and discriminates arbitrarily and unreasonably between appellant and others similarly situated.

2. Said Court erred in holding and deciding that Chapter 13700, Laws of Florida, 1929, is not repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States in that in and by such statute the State of Florida seeks to levy a tax upon the appellant in denial of equal protection of the laws, particularly in that the tax [fol. 75] imposed arbitrarily and unreasonably, discriminates against appellant, and favors others similarly situated.

3. Said Court erred in holding and deciding that Chapter 13700, Laws of Florida, 1929, is not repugnant to paragraph 2 of Article VI of the Constitution of the United States in that in and by said statute the State of Florida seeks to impose a toll which contravenes Section 9, Chapter 1 of the Federal Highway Act.

4. Said Court erred in holding and deciding that Chapter 13700, Laws of Florida, 1929, is not repugnant to the provisions of the Constitution of the United States and particularly to Section 1 of Article XIV of the Amendments therof, in that in and by said statute the State of Florida seeks to take the private property of appellant for public use without just compensation, and to deprive appellant of his property without due process of law.

5. Said Court erred in holding and deciding that the transportation by appellant of merchandise over the highways of the State of Florida as a private carrier under private contract could be validly prohibited by the State of Florida, and that said Chapter 13700, Laws of Florida, 1929, prohibiting such transportation, does not thereby violate the provisions of Section 1 of Article XIV of the Amendments of the Constitution of the United States, in that in and by said statute the State of Florida seeks to take the private property of appellant for public use without just compensation and to deprive appellant of his property without due process of law.

6. Said Court erred in holding and deciding that the State of Florida may validly convert the private property of appellant, used exclusively in the business of a private carrier, into public carrier property by compelling appellant, as a condition to carrying private property by private contract over the highways of the State of Florida, to subject himself to the jurisdiction of the Railroad Commission of the State of Florida, assume the duties and burdens of a [fol. 76] common carrier, and thus dedicate his property to public use and become a common carrier, and in holding and deciding that Chapter 13700, Laws of Florida, 1929, which compels appellant so to convert his property into a public utility, is not repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States

in so far as said Section provides that no State shall take the private property of any person for public use without just compensation, or deprive any person of property without due process of law.

7. Said Court erred in holding and deciding that Chapter 13700, Laws of Florida, 1929, is not repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States in that in and by such statute, the State of Florida seeks to convert or transmute appellant, a private contract carrier, against his will, into a common carrier, by legislative fiat or command, and thus deprive appellant of his property without due process of law.

8. Said Court erred in holding and deciding that Chapter 13700, Laws of Florida, 1929, is not repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States in that in and by such statute the State of Florida seeks to levy a tax, so capricious, arbitrary and unreasonable, as to amount to confiscation of appellant's property without due process of law.

9. Said Court erred in holding and deciding that Chapter 13700, Laws of Florida, 1929, is not repugnant to Section 10 of Article I of the Constitution of the United States in that in and by said statute the State of Florida seeks to impair the obligation of contract of appellant.

10. Said Court erred in holding and deciding that Chapter 13700, Laws of Florida, 1929, is not repugnant to Section 1 of Article XIV of the Amendments of the Constitu-
[fol. 77] tion of the United States in that in and by said statute the State of Florida seeks to deny to appellant the liberty of contract without due process of law.

11. Said Court erred in holding and deciding that Chapter 13700, Laws of Florida, 1929, is not repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States in that in and by said statute the State of Florida seeks to enforce a penal statute which as construed by said Court, is so vague, uncertain and indefinite that it denies to appellant due process of law.

12. Said Court erred in holding and deciding that Chapter 13700, Laws of Florida, 1929, is not repugnant to Sec-

tion 1 of Article XIV of the Amendments of the Constitution of the United States, in that in and by said statute the State of Florida seeks to deprive appellant of his liberty without due process of law.

13. Said Court erred in holding and deciding that the Legislature of the State of Florida, in and by Chapter 13700 Laws of Florida, 1929, could require appellant, a private contract carrier, not engaged in any public business, as a necessary prerequisite to his use of the highways of the State of Florida, to secure a certificate of public convenience and necessity from the Railroad Commission of the State of Florida, thus depriving appellant of his property without due process of law, and denying appellant the equal protection of the laws, as guaranteed to him by Section 1, Article XIV of the Amendments of the Constitution of the United States.

14. Said Court erred in reversing the final judgment of the Circuit Court of the Fourth Judicial Circuit of the State of Florida, in and for Duval County, made and entered on the 5th day of September, A. D. 1929, and in not giving to appellant his rights under the Constitution of the [fols. 78 & 79] United States, as claimed, and set forth in the record in this cause.

Prayer for Reversal

For which errors appellant, E. S. Smith, prays that the said judgment of the Supreme Court of the State of Florida, dated July 8th, 1930, in the above entitled cause, be reversed and a judgment entered in favor of appellant, and for costs.

John C. Mathews, Counsel for Appellant.

[fol. 80] In Supreme Court of Florida

[Title omitted]

Order Allowing Appeal—Filed Aug. 14, 1930

The Appellant in the above entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme

Court of the United States from the judgment made and entered in the above entitled cause by the Supreme Court of the State of Florida, on the 8th day of July, 1930, and from each and every part thereof and having presented and filed his petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Florida in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Florida shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $1,000 bond to be approved by the Chief Justice of the State of Florida, and when so approved [fols. 81 & 82] said bond shall act as a supersedeas, and all further proceedings in the Court below shall be stayed pending the outcome of the appeal.

Glenn Terrell, Chief Justice Supreme Court of the State of Florida.

Dated. Aug. 14, 1930.

[fols. 83-85] Citation, in usual form, showing service on Fred H. Davis, omitted in printing.

[fols. 86-89] Bond on appeal for $1,000 approved; omitted in printing.

[fol. 90] IN SUPREME COURT OF FLORIDA

[Title omitted]

STIPULATION FOR RECORD—Filed Aug. 26, 1930

The parties hereto by their attorneys of record hereby stipulate that the Clerk of the Supreme Court of the State

of Florida, in preparing and making up the Record in this cause, shall include the entire record as follows:

1. The copy of the record brought up from the Circuit Court of the Fourth Judicial Circuit of the State of Florida in and for Duval County, which was considered by the Supreme Court of the State of Florida.

2. A copy of the Decision or Opinion of the Supreme Court of the State of Florida.

3. A copy of the final Mandate or Judgment of the Supreme Court of the State of Florida.

4. A copy of Petition for Appeal, and Assignment of Errors and Prayer for Reversal.

5. Copy of the Order of the Chief Justice of the Supreme Court of the State of Florida allowing the Appeal.

6. The original Citation together with the acceptance of service.

7. The Order fixing bond.

[fol. 91] 8. The Bond as filed and approved.

9. A copy of this Stipulation.

In making up an preparing the Record the Clerk will copy all papers except the Citation and the acceptance of service thereon, and as to such Citation and acceptance of service he will include the originals.

After preparing and making up the Record the Clerk will certify to the same and will impress his Seal thereon.

John E. Mathews, Attorney of Record for the Appellant. Fred H. Davis, Attorney General of the State of Floida and Attorney for the Appellee.

[fol. 92] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 93] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Sept. 23, 1930

Comes now the Appellant and adopts his Assignments of Error, as his statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case. (Assignments

of Error are found on pages 74 through 78 of the Transcript of Record.)

John W. Davis, Counsel for Appellant.

[fol. 94] To Fred H. Davis, Attorney General of Florida, counsel of record for the appellee, W. B. Cahoon, Sheriff of Duval County, Florida:

You are hereby notified that a Statement of Points to be relied upon and of Designation of the Parts of the Record to be Printed in the above entitled cause will be filed in the Supreme Court of the United States on or before the 26th day of September, 1930. A copy of the Statement of Points to be relied upon and of Designation of the Parts of the Record to be Printed is served upon you herewith.

E. S. Smith, Appellant.

Service accepted this 20th day of September, 1930.

Fred H. Davis, Attorney General, Counsel for Appellee.

[fols. 95-98] [File endorsement omitted.]

Endorsed on cover: File No. 35,371. Florida Supreme Court. Term No. 449. E. S. Smith, Appellant, vs. W. B. Cahoon, Sheriff of Duval County, Florida. Filed September 11, 1930. File No. 35,371.

FILE COPY

FILED
OCT 6 1930
CHARLES ELMORE CROPL
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1930.

No. 449.

E. S. SMITH,

Appellant,

vs.

W. B. CAHOON, Sheriff of Duval County, Florida,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

STATEMENT OF APPELLANT AS TO JURISDICTION ON APPEAL, AS REQUIRED BY RULE NO. 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES EFFECTIVE JULY 1, 1928.

JOHN E. MATHEWS,
Attorney for Appellant,
45 West Forsyth St.,
Jacksonville,
Florida.

JOHN W. DAVIS,
CHARLES H. O'CONNOR,
Of Counsel.

THE BALLOU PRESS NEW YORK

Supreme Court of the United States.

OCTOBER TERM, 1930.

E. S. SMITH, Appellant, vs. W. B. CAHOON, Sheriff of Duval County, Florida, Appellee.	No. 449

STATEMENT OF APPELLANT AS TO JURISDICTION ON APPEAL.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining the Jurisdiction of This Court.

This appeal is taken under Sections 861 (a) and 861 (b) of Title 28 of the United States Code, as amended April 26, 1928, and under Rule 46 of the Rules of this Court effective July 1, 1928. Under the old practice a writ of error would have been issued under Section 237 of the Judicial Code as amended, by act of February 13, 1925 (c. 222, 43 Stat. 938), being Section 344, Title 28, of the United States Code, and particularly under Section 237 (a) of the Judicial Code as amended, providing in part that

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be

had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

B.

Date of Final Mandate or the Judgment and Date of Application for Appeal.

The final mandate or judgment of the Florida Supreme Court was dated on July 8, 1930 (R. pp. 71-72)* which referred to and made effective the Order of Reversal dated May 21, 1930 (R. p. 64).

The application for appeal therefrom was presented, the order allowing appeal entered and the citation issued and served on August 14, 1930 (R. pp. 73-84).

C.

Nature of Case and Rulings Below.

1. Facts and Rulings of Florida Circuit Court.

The Appellant, a private contract carrier, transporting merchandise for hire by motor vehicle, was arrested on a warrant charging him with operating his truck and trailer without a certificate of public convenience and necessity and without an advance payment of the mileage tax in violation of Chapter 13,700, Laws of Florida, 1929 (R. pp. 2-3). The Appellant concededly is a private carrier employed by the Great Atlantic & Pacific Tea Company under a single contract to haul merchandise from its Jacksonville warehouse to certain of its retail stores situated in several of the towns and cities of Florida (R. pp. 12, 16).

---

* Note: All references herein to the Record are to the pages of the certified unprinted Record prepared by the Clerk of the Supreme Court of Florida on file with the Clerk of this Court. The Record has not yet been printed.

After a preliminary hearing before a Justice of the Peace he was committed to the custody of the Sheriff of Duval County, Florida, the Appellee herein, and bound over to the Criminal Court of Record of that County (R. pp. 2, 8, 35-36). Petition for a writ of habeas corpus was addressed to the Circuit Court of Duval County (R. pp. 2-7). On the authority of *Frost* v. *Railroad Commission of California*, 271 U. S. 583, and *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, the Court ordered the release of the Appellant, holding that he was being illegally detained under an unconstitutional statute, which, according to the plain and natural meaning of its provisions, required a private carrier to assume the duties, burdens and obligations of a common carrier and become subject to the same rules and regulations (R. pp. 37-43). In the words of the Court:

> "It is, therefore, the opinion of the Court that Chapter 13700, Laws of Florida, 1929, violates Sections 1 and 12 of the Declaration of Rights of the Constitution of the State of Florida, and the Fourteenth Amendment of the Constitution of the United States, in so far as the same relates to private carriers for compensation * * *
>
> "A number of other constitutional objections were raised by the Petitioner, but the Court having reached the conclusion above set forth, it is unnecessary to decide the other questions presented" (R. p. 42).

2. The Statute.

Chapter 13,700, Laws of Florida, 1929, provides for the supervision and regulation by the State Railroad Commission and also for the taxation of auto transportation companies engaged in the business of transporting persons or property over the public highways of the State. In Section 1(h) the term "auto transportation company" is defined to mean anyone who owns, controls, operates or manages a motor vehicle "used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route". The term "motor

vehicle" is defined to mean all motor vehicles "used upon the public highways for the transportation of persons or property for compensation as common carriers". Excluded from both these definitions are, among others, those "engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimps from the point of production to the assembling or shipping point en route to primary market * * *". By Section 2 no auto transportation company is permitted to "operate any motor vehicle for the transportation of persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future public convenience and necessity requires or will require such operation." By Section 3 the Railroad Commission is empowered after a hearing to "issue a Certificate of Public Convenience and Necessity, as prayed for, or refuse to issue the same, or * * * may issue the same with modification or upon such terms and conditions as in its judgment the public convenience and necessity may require". In applying for a certificate, the applicant is required to file his tariffs and time schedules of operation. By Section 5 the Railroad Commission is "vested with power and authority to supervise and regulate every auto transportation company in the State, to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company, to regulate the service and safety of operations of each such auto transportation company"; to prescribe uniform systems of accounts, to require filing of annual reports and other data; "and to supervise and regulate auto transportation companies in all other matters affecting the relationship between such companies and the travelling and shipping public". By Section 6 an auto transportation company is required to file tariffs and time schedules with the Commissions; and "to keep open for public inspection at designated offices so much of said schedules of rates and fares and time schedules" as the Commission deems necessary. It is made unlaw-

ful for any transportation company to collect or receive a greater or less rate for services rendered than the charge set forth in the schedules on file with the Commission. By Section 13 a violation of any provision of this Act or a failure to comply with any order of the Railroad Commission is made a misdemeanor punishable by fine, or by imprisonment, or by both. Under Section 14 every transportation company which has been granted a Certificate of Public Convenience and Necessity is required to pay a mileage tax of one cent per mile on each one of its motor vehicles of the capacity of the two motor vehicles operated by the Appellant; and the Comptroller of the State is directed to collect from each holder of a certificate the sum of $75 every three months from and after the issuance of the certificate, as an advance payment upon this mileage tax (R. pp. 16-17). The object of the tax is set forth in Sections 15 and 18. It is to provide funds to pay for the past and future construction of a State system of good roads and its maintenance.

3. Rulings of the Supreme Court of Florida.

On writ of error to the Supreme Court of Florida the order of the Circuit Court was reversed.

The Court refused to consider the effect of the Act in its entirety, ruling, with obvious violence to the manifest legislative intent (128 So. 634), that

> "the statute does not require private carriers to become common carriers and the provisions of the statute that are legally applicable only to common carriers are not intended to be applied to, and are not applicable to, corporations or persons who are not common carriers, though engaged in the transportation to which the statute refers; and the provisions of the statute that are legally applicable to private carriers for compensation are capable of being effectuated, leaving the provisions that are legally applicable only to common carriers to be applied to such common carriers as are covered by the statute. This does not violate the pertinent principles that are announced in *Michigan Public Utilities*

Co. v. *Duke*, 266 U. S. 570, 45 Supreme Court 191, 69 Law Ed. 445, 36 A. L. R. 1105; *Frost* v. *Railroad Commission of California*, 271 U. S. 583, 46 Supreme Court 605, 70 Law Ed. 1101, 47 A. L. R. 457" (R. p. 61).

The Court, however, failed to state with which of the provisions a private carrier should comply so as not to provoke the penalties under Section 13. By such construction, the penal provision becomes so vague and indefinite as to deprive the appellant of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Court took the position that the only portions of the statute involved in the case actually pending before it were those pertaining to certificates of public convenience and necessity and the mileage tax, and in respect to them decided (128 So. 634) that

> "The requirements as to procuring certificates of convenience and necessity for doing the business on the highways and as to the tax imposed on the business may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State, in the exercise of the police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes" (R. p. 61).

With respect to the mileage tax, the Court ruled (128 So. 635) that

> "it is not in law or in fact a 'toll' collected for vehicular passage over the roads, it not being collected for mere passage over the roads or 'exacted when and as the privilege of passage is exercised'. *Carley & Hamilton* v. *Snook* [281 U. S. 66], 50 Sup. Ct. 204, 74 Law Ed. [250] February 24, 1930" (R. p. 61).

The Court further decided (128 So. 635) that

> "Even if the 'mileage tax' as here imposed may be regarded as a 'toll' under the Federal Highway Act, it is not shown that the petitioner operates only upon high-

ways that have been 'constructed or reconstructed' under the Federal Act. The state law is operative upon state highways when not in conflict with applicable dominant federal authority. See *Carley* v. *Snook*, 50 S. Ct. 204, 74 L. Ed. [250]; *Bekins Van Lines* v. *Riley*, 280 U. S. 80, 50 S. Ct. 64, 74 L. Ed. [96]; *Iowa Motor Vehicle Ass'n* v. *Board*, 207 Iowa, 461, 221 N. W. 364; *Williams* v. *Riley*, 280 U. S. 78, 50 S. Ct. 63, 74 L. Ed. [95]" (R. p. 62).

As to the exceptions from the operation of the statute of those auto transportation companies "engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market", the Court ruled without accompanying reasons (128 So. 635) that

> "Such exceptions have a reasonable basis for just distinctions, and do not make the statute operate arbitrarily upon some and not upon others under practically similar conditions." (R. pp. 62-63).

Thus the Federal questions presented by the assignments of error in the appeal now before this Court were presented upon appeal and were passed upon by the Supreme Court of Florida. The decision of the Florida Supreme Court filed May 21, 1930 (R. pp. 64-65), and the judgment entered thereon were in favor of the validity of Chapter 13,700, Laws of Florida, 1929, as so construed and applied by said Court, and denied the claims of the appellant that said statute was repugnant to the Constitution and Laws of the United States.

D.

Cases Sustaining the Jurisdiction.

Frost v. *Railroad Commission of California*, 271 U. S. 583;

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389;

International Harvester Company v. *Kentucky*, 234 U. S. 216;
Manley v. *Georgia*, 279 U. S. 1.

In each of the cases cited, this Court has assumed jurisdiction on appeal or on a writ of error to the state court under the former procedure, to determine whether a state statute, as construed and applied by the highest court of the state, is valid under the Constitution and Laws of the United States. These cases are therefore authorities sustaining the jurisdiction of this Court.

That substantial Federal questions are involved see

Michigan Public Utilities Commission v. *Duke*, 266 U. S. 570;
Tyson & Brother v. *Banton*, 273 U. S. 418;
Terminal Taxicab Co. v. *District of Columbia*, 241 U. S. 252;
Connally v. *Union Sewer Pipe Co.*, 184 U. S. 540;
Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32;
Carley & Hamilton v. *Snook*, 281 U. S. 66;
Connolly v. *General Construction Company*, 269 U. S. 385.

We respectfully submit that this Court has jurisdiction of this appeal.

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Supreme Court of the United States.

OCTOBER TERM, 1930

No. 449.

E. S. SMITH,

Appellant,

vs.

W. B. CAHOON, Sheriff of Duval County, Florida,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF ON BEHALF OF APPELLANT.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Statement of Case	3
Specifications of Error	4
The Statute Involved	4
Summary of Argument	8
POINT I. Chapter 13,700, Laws of Florida, 1929, requires the appellant, admittedly a private carrier, to dedicate his property to the quasi-public use of public transportation, thus taking his private property for public use without just compensation, and depriving him of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States	14
POINT II. Chapter 13,700, Laws of Florida, 1929, as construed by the Supreme Court of Florida, is so vague and indefinite as to deprive the appellant of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States	24
POINT III. Chapter 13,700, Laws of Florida, 1929, being a regulation of the business of transportation, and not a highway measure, the State of Florida cannot subject the appellant's business, unaffected, as it is, "with a public interest" to certificate regulation in contravention of the Fourteenth Amendment to the Constitution of the United States	28
POINT IV. To require a certificate of public convenience and necessity of the appellant, and to exempt other private carriers similarly situated from such regulation is to deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States	32

PAGE

POINT V. By imposing an unreasonable and arbitrary tax upon the appellant and exempting others similarly circumstanced from the burdens of such taxation, the State of Florida has denied the appellant his right to the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States... 40

POINT VI. The so-called Mileage Tax imposed by Chapter 13,700, Laws of Florida, 1929, is not a tax but a toll exacted by the State for the use of all its public highways and is, therefore, invalid, conflicting, as it does, with the Federal Highway Act, Chapter I, Section 9, in contravention of Article VI, Section 2, of the Constitution of the United States..... 45

POINT VII. Whether the "Mileage Tax" be construed as "a license tax imposed upon the intrastate business of transportation for compensation on the public roads of the State" or a "toll" charged for passage over the highways, such "tax" is so arbitrary and oppressive as to amount to confiscation of appellant's property in violation of the guarantee of the Fourteenth Amendment... 54

POINT VIII. Chapter 13,700, Laws of Florida, 1929, impairs the obligation of appellant's contract in violation of Paragraph 1, Section 10, of Article I of the Constitution of the United States, and deprives him of his liberty to contract in contravention of the Fourteenth Amendment to the Constitution of the United States..... 57

CONCLUSION. In accordance with the foregoing, it is respectfully submitted that the decision of the Supreme Court of Florida should be reversed and the case remanded with directions that the appellant be discharged 58

APPENDIX A. Comparison of Chapter 13,700, Laws of Florida, with Auto Stage and Truck Transportation Act of California, held unconstitutional in Frost v. R. R. Comm., 271 U. S. 583..... 59

Table of Cases Cited.

PAGE

Airway Electric Appliance Corp. v. Day, 266 U. S. 71, 75 41
Allgeyer v. Louisiana, 165 U. S. 578, 589..... 58
American Seeding Machine Company v. Kentucky, 236 U. S. 660 25
Bacon Service Company v. Huss, 199 Cal. 71, 248 Pac. 235 43
Bailey v. Drexel Furniture Co., 259 U. S. 20, 36, 37..... 47
Barbour v. Walker, 126 Okla., 227, 259 Pac. 552..... 23
Bekins Van Lines, Inc. v. Riley, 280 U. S. 80, 82.....12, 43
Big Bend Auto Freight v. Ogers, 148 Wash. 521, 269 Pac. 802 22
Buck v. Kuykendall, 267 U. S. 307, 315.....8, 10, 20, 29
Butchers' Union Slaughter Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 752, 754..... 58
Carley & Hamilton v. Snook, 281 U. S. 66, 73-74.12, 13, 49, 51
Chaddock v. Day, 75 Mich., 527, 42 N. W. 977..... 57
Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 866, 876..... 27
City of St. Louis v. Western Union Telegraph Company, 148 U. S. 92, 97 48
Cline v. Frink Dairy Company, 274 U. S. 445, 454..... 25
Collins v. Kentucky, 234 U. S. 634, 638 25
Commonwealth v. Louisville & N. R. Company, 46 S. W. (Ky.) 700 26
Connally v. General Construction Company, 269 U. S. 385 25
Connolly v. Union Sewer Pipe Company, 184 U. S. 540 .....12, 34, 35, 43
Cooley on Taxation, Vol. I, Section 14, 4th Edition.... 48
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 111 34
Davis v. Metcalf, 131 Wash. 141, 229 Pac. 2..... 22
Detroit United Railway v. Michigan, 242 U. S. 238.... 57
Fenwick Hall Co. v. Saybrook, 69 Conn. 32..... 20

PAGE

Fiscal Court v. F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296, 298 57
Franchise Motor Freight Association v. Seavey, 196 Cal. 77, 235 Pac. 1000 .....11, 36, 43
Frost v. Corporation Commission, 278 U. S. 515, 524... 39
Frost v. Railroad Commission of California, 271 U. S. 583 .....3, 8, 10, 14, 15, 16, 17, 20, 23 29, 30
Georgia Public Service Commission v. Saye & Davis Transfer Co., 170 Ga. 873, 154 S. E. 439..... 23
Griffin v. Murphy, 51 S. D. 50, 211 N. W. 804..... 22
Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, 155 34
Hayes v. Missouri, 120 U. S. 68, 71..... 34
Hill v. Wallace, 259 U. S. 44, 66-67..... 47
Hissem v. Guran, 112 Ohio St. 59; 146 N. E. 808..... 22
Huse v. Glover, 119 U. S. 543, 548.....13, 48, 52
International Harvester Company v. Kentucky, 234 U. S. 216 25
Johnson Transfer & Freight Lines v. Perry [(D. C. N. D. Ga.), a federal three-judge court Equity No. 598].. 23
Jones v. Ferguson, 181 Ark. 522, 27 S. W. (2) 96..... 22
Jordan & Skaneateles, Pl. R. Co. v. Morley, 23 N. Y. 552 .....13, 50
Kane v. New Jersey, 242 U. S. 160, 168..... 51
Kellaher v. City of Portland, 57 Ore. 575, 112 Pac. 1076. 43
Liggett Co. v. Baldridge, 278 U. S. 105, 111..... 56
Lipke v. Lederer, 259 U. S. 557, 561-562..... 47
Lossing v. Hughes (Tex. Cr.), 244 S. W. 556, 559-566..12, 42
Louisiana R. & Nav. Co. v. Behrman, 235 U. S. 164, 170. 57
Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 37 41
Louisville & N. R. Company v. Railroad Commissioner of Tennessee, 19 Fed. 679 25
Macallen Co. v. Massachusetts, 279 U. S. 620, 625..... 47
McCulloch v. Maryland, 4 Wheat. 316, 429, 431..... 46
McIntyre v. Harrison [Supreme Court of Georgia, No. 7887] 23

PAGE

Michigan Public Utilities Commission v. Duke, 266 U. S. 570 ..... 3, 10, 23, 29, 30
Mooney v. Tuckerman, 50 R. I. 37, 144 Atl. 891 22
Northern Pac. Ry. Co. v. U. S., 213 Fed. 162 26
Pennsylvania Coal Company v. Delaware & Hudson Canal Company, 40 N. Y. (1 Keyes) 72, 80-81 ..... 13, 50
Powell v. Pennsylvania, 127 U. S. 678, 684 58
Purple Truck Garage Company v. Campbell, 119 Or. 484, 250 Pac. 213 22
Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 ..... 17, 41, 43
Re Shelton Railroad, 69 Conn. 626 20
Royster Guano Co. v. Virginia, 253 U. S. 412 41
Rutledge Cooperative Association v. Baughman, 153 Md. 297, 138 Atl. 29 23
Sands v. Manistee River Improvement Company, 123 U. S. 288, 293 48
Schlesinger v. Wisconsin, 270 U. S. 230, 240 41
Southern Motors v. Perry (D. C. N. D. Ga.), 39 Fed. (2d) 145 22
State v. Allen, 83 Fla., 214, 91 So. 104 57
State v. Nelson, 65 Utah, 457, 238 Pac. 237 23
State v. Smith, 31 Ariz. 297, 252 Pac. 1011, 1012 23
St. Louis Compress Co. v. Arkansas, 260 U. S. 346, 348. 47
St. Louis Cotton Compress Company v. Arkansas, 260 U. S. 346, 348 18
Terminal Taxicab Co. v. Kutz, 241 U. S. 252 ..... 10, 30
Towers v. Wildason, 135 Md. 677, 109 Atl. 471 23
Tozer v. United States, 52 Fed. 917 25
Trade Mark Cases, 100 U. S. 82, 98 ..... 9, 26
Truax v. Corrigan, 257 U. S. 312, 332 34
Tyson & Bro. v. Banton, 273 U. S. 418, 434 ..... 10, 29
United States v. Brewer, 139 U. S. 278 26
United States v. Capitol Traction Company, 34 D. C. Appeals, 595 25

PAGE

United States v. Cohen Grocery Company, 255 U. S. 81, 89 25
United States v. Reese, 92 U. S. 214, 221 ..... 9, 26
United States v. Sharp, Pet. CC. 118, 122 (Fed. Case No. 16,264) 26
Valentine v. Berrien, 124 Mich. 664, 83 N. W. 594..... 43
Weaver v. Public Service Commission of Wyoming, 40 Wyo. 462, 278 Pac. 542..... 22
Weeds, Incorporated v. United States, 255 U. S. 109... 25
Weimar Storage Co. v. Dill (1928, N. J.), 143 Atl. 439.. 43
Weiss v. Stearn, 265 U. S. 242, 254..... 47
Wolff Packing Company v. Industrial Court, 262 U. S. 522 17
Yu Cong Eng v. Trinidad, 271 U. S. 500, 517 ..... 9, 26

Other Citations.

CONSTITUTION OF THE UNITED STATES.

Article 1, Section 10, Paragraph 1.....2, 57
Article VI, Section 2.....2, 45, 53
XIV Amendment 2, 45

FEDERAL STATUTES.

Act of Feb. 13, 1925, c. 237 (a), 43 Stat. 936 (U. S. Code, Title 28, § 344) 2
U. S. Code, Title 28, § 861 (a), § 861 (b) 2
Federal Highway Act, Chapter I, Section 9..... 45

RULES OF THE SUPREME COURT OF THE UNITED STATES.

Rule 46, effective July 1, 1928 2

CONSTITUTION OF THE STATE OF FLORIDA.

Article III, Section 16.....15, 16

PAGE

FLORIDA STATUTES.

Chapter 13,700, Laws of Florida, 1929 [Compiled Laws of Florida (1930 Supp.), Sec. 1335].....4, 25, 33, 59

CALIFORNIA STATUTES.

Chapter 213, Statutes 1917, page 230. Amended by Ch. 280, Stats. 1919, p. 457..... 59
Chapter 310, Stats. 1923, p. 644 36

CHINESE PENAL CODE..... 27

LEGAL PERIODICALS.

Brown and Scott, *Regulation of the Contract Motor Carrier Under the Constitution*, 44 Harv. L. Rev. 530 .....9, 21-22, 31

OTHER AUTHORITIES.

Walker, *Highway Tax Costs* (National Automobile Chamber of Commerce) 56
I. C. C. Hearings, Docket 23,400..... 30

Supreme Court of the United States.

OCTOBER TERM, 1930.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF ON BEHALF OF APPELLANT.

Opinion Below.

The opinion of the Supreme Court of the State of Florida is reported in 99 Fla. 178, 128 So. 632 (1930), and appears in the Record at pages 43-47.

Jurisdiction.

The final mandate or judgment of the Florida Supreme Court was rendered on July 8, 1930 (R., 49), which referred to and made effective the Order of Reversal dated May 21, 1930 (R., 48). The application for appeal therefrom was presented, the order allowing appeal entered, and the citation issued and served on August 14, 1930 (R., 50-54).

Probable jurisdiction was noted by this Court (51 Sup. Ct. 89, 75 L. Ed. 114).

The claims advanced in the lower court, which are relied upon as the basis of this Court's jurisdiction, were that Chapter 13,700, Laws of Florida, 1929, is invalid on the ground of being repugnant to the Fourteenth Amendment of the Constitution of the United States, to Article I, Section 10, Paragraph 1, and to Article VI, Section 2, of the Constitution of the United States (R., 43-47). The rulings made were that said Florida statute is valid and not repugnant to the Constitution, or laws of the United States (R., 43-47).

The jurisdiction of this Court is invoked under the Act of February 13, 1925, 43 Stat. 936, entitled "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeal and of the Supreme Court, and for other purposes", and appeared under Section 237(a) of the Judicial Code, as thus amended, providing, in part, that:

> "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn, in question the validity of a statute of any State, on the ground of being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error" (U. S. Code, Title 28, Sec. 344).

Under the former practice a writ of error would have been issued. This appeal is taken under Sections 861(a) and 861(b) of Title 28 of the United States Code, as amended April 26, 1928, and under Rule 46 of the Rules of this Court, effective July 1, 1928.

Statement of Case.

This case is before this Court on *habeas corpus* proceedings. The appellant, a private contract carrier, transporting merchandise for hire by motor vehicle over the public highways of Florida, was arrested on a warrant charging him with operating his truck and trailer without a certificate of public convenience and necessity, and without having made an advance payment of the mileage tax, in violation of Chapter 13,700, Laws of Florida, 1929 (R. 1-4).

The appellant, concededly, is a private carrier employed by the Great Atlantic & Pacific Tea Company under a single contract to haul merchandise from its Jacksonville warehouse to certain of its retail stores situated in towns and cities of Florida (R., 6, 8-9). Though the appellant hauls on a comparatively regular schedule, it is far from inflexible. The appellant is not a common carrier and never at any time has held himself out as a carrier to the public (R. 9).

After a preliminary hearing before a Justice of the Peace, he was committed to the custody of the Sheriff of Duval County, Florida, the appellee herein, and bound over to the criminal court of record of that county (R., 1-5, 29-30).

Petition for a writ of *habeas corpus* was addressed to the Circuit Court of Duval County (R., 1-4).

On the authority of *Frost* v. *Railroad Commission of California*, 271 U. S. 583, and *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, the Court ordered the release of the appellant, holding that he was being illegally detained under an unconstitutional statute, which, according to the plain and natural meaning of its provisions, required a private carrier to assume the duties, burdens and obligations of

a common carrier and become subject to the same rules and regulations (R. 31-35).

On writ of error to the Supreme Court of Florida, the order of the Circuit Court was reversed, the Court ruling, in effect, that the appellant was under lawful arrest in the custody of the appellee (R. 48).

In reaching this conclusion, the Supreme Court of Florida held that Chapter 13,700, Laws of Florida, 1929, as construed and applied to the appellant, was constitutional. The Court specifically ruled that notwithstanding the status of the appellant as a private carrier under a single private contract, he was nevertheless subject to those provisions of Chapter 13,700, requiring him to obtain a certificate of public convenience and necessity and pre-pay a mileage tax before using the public highways.

Specifications of Error.

The ultimate error assigned is that the Supreme Court of Florida erred in holding as a matter of law that Chapter 13,700, of the Laws of Florida, 1929, as construed and applied to this appellant, was a lawful and constitutional statute. The detailed specifications of error (all of which are intended to be urged here) are set forth in the assignments of error (R. 50-53).

The Statute Involved.*

Chapter 13,700, laws of Florida, 1929, provides for the supervision and regulation by the State Railroad Commission

* The text of the statute is set forth in full in Appendix A (*infra*, pp. 59-90).

and also for the taxation of auto transportation companies engaged in the business of transporting persons or property over the public highways of the State.

In Section 1(h) the term "auto transportation company" is defined to mean anyone who owns, controls, operates or manages a motor vehicle "used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route". The term "motor vehicle" is defined to mean all motor vehicles "used upon the public highways for the transportation of persons or property for compensation as common carriers". Excluded from both these definitions are, among others, those "engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimps from the point of production to the assembling or shipping point en route to primary market * * *".

By Section 2 no auto transportation company is permitted to "operate any motor vehicle for the transportation of persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future *public** convenience and necessity requires or will require such operation".

By Section 3 the Railroad Commission is empowered after a hearing to "issue a Certificate of Public Convenience and Necessity, as prayed for, or refuse to issue the same, or * * * may issue the same with modification or upon such terms and conditions as in its judgment the *public* convenience and necessity may require". In applying for a certificate, the

* Italics ours, unless otherwise noted.

applicant is required to file his *tariffs* and *time schedules* of operation.

By Section 5 the Railroad Commission is "vested with power and authority to supervise and regulate every auto transportation company in the State, to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company, to regulate the service and safety of operations of each such auto transportation company"; to prescribe uniform systems of accounts, to require filing of annual reports and other data; "and to supervise and regulate auto transportation companies in all other matters affecting the relationship between such companies and the travelling and shipping public".

By Section 6 an auto transportation company is required to file tariffs and time schedules with the Commission; and "to keep open for public inspection at designated offices so much of said schedules of rates and fares and time schedules" as the Commission deems necessary. It is made unlawful for any transportation company to collect or receive a greater or less rate for services rendered than the charge set forth in the schedules on file with the Commission.

By Section 13 a violation of any provision of this Act or a failure to comply with any order of the Railroad Commission is made a misdemeanor punishable by fine, or by imprisonment, or by both.

Under Section 14 every transportation company which has been granted a Certificate of Public Convenience and Necessity is required to pay a mileage tax of one cent per mile on each one of its motor vehicles of the capacity of the two motor vehicles operated by the appellant (R. 14-15); and the Comptroller of the State is directed to collect from each holder of a certificate the sum of $75 every three months

from and after the issuance of the certificate, as an advance payment upon this mileage tax.

In sections 15 and 18 are set forth the uses to which the moneys collected in the form of the mileage tax shall be put.

Section 15 provides that 5% of the moneys so collected shall be used "to cover the expenses of the administration of this Article", by the Railroad Commission; the remaining 95% to go to the several counties over whose highways the auto transportation companies operate. "To each county whose highway system is used" shall go "its part of said balance in the proportion that the bus mileage traveled over its highway system bears to the entire bus mileage traveled"; said moneys to be used "to pay the interest on and provide a sinking fund to retire the county bonds issued for the purpose of constructing the state system or the county system of good roads within said county or to be used by [the] county commissioners * * * for said purpose."

Section 18 provides, in the event that Section 15 be unconstitutional, "such balance of such proceeds above described shall be paid into the state road license fund and shall be used for the construction and maintenance of state roads under the direction of the State Road Department."

Summary of Argument.

I. The Florida staute under review is substantially identical with the California statute, which was held unconstitutional by this Court in *Frost* v. *Railroad Commission of California,* 271 U. S. 583. In the instant case, as in the *Frost* case, the state courts construed the statutes as regulations of the business of transportion for compensation. This determination was essential, in the present case, to sustain the statute under Section 16 of Article III of the Constitution of the State of Florida, which provides that no bill shall embrace but one subject and matter properly connected therewith; and that the subject matter of an act be briefly embraced in its title. The conclusion of the Florida court that the statute here under review "does not require private carriers to become common carriers" is not binding on this Court, being as it is a mere legal conclusion, which is always a proper subject of review. With respect to the provisions requiring a certificate of public convenience and necessity, no machinery is set up to deal with private carriers separately from common carriers. In order to obtain a certificate the appellant is required to make a showing that public convenience and necessity demand his operation, just as a common carrier. His right to engage in the business rests within the discretion of the Commission: the test is the adequacy of transportation facilities by motor carriers in his locality. For a certificate "is designed primarily to promote good service by excluding unnecessary competing carriers"; it is a regulation for "the prohibition of competition". *Buck* v. *Kuykendall,* 267 U. S. 307, 315. In applying for a certificate, the appellant must file his rates, tariffs and schedules, and the certificate may be denied him in the interests of the shipping public. This, we submit, constitutes a dedication of "his property to the quasi-public use of public

transportation", notwithstanding any ruling of the Florida Supreme Court to the contrary. With but a single exception, the state courts have held that a state has no power to require a certificate of a private carrier such as the appellant. The exception based its decision on the proposition that the certificate there was a regulation of the highways, not a regulation of the business of carriage. To this Court's attention we commend an excellent analysis of *"Regulation of the Contract Motor Carrier Under the Constitution"*, by Messrs. Brown and Scott, 44 Harv. L. Rev., 530.

II. As written, the statute is plain and clear enough, encompassing as it does both private and common carriers within the scope of all of its provisions; and so read is unconstitutional under the *Frost* decision. In its ineffectual attempt to save this statute from the fate of the California statute, the Florida Court ruled, with obvious violence to the plain wording of the statute, that some provisions, unspecified in the opinion, are *legally* applicable only to private carriers, others solely to common carriers. No designation, guide or standard is furnished for this classification of the statutory requirements. By such construction the statute, otherwise definite, becomes so vague and indefinite as to deprive appellant of his liberty and property without due process of law. *United States* v. *Reese*, 92 U. S. 214, 221; *Trade Mark Cases*, 100 U. S. 82, 98; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518.

III. Assuming, *arguendo*, that the legal effect of Chapter 13,700, Laws of Florida, 1929, is not to subject the appellant to the same obligations and regulations as common carriers, nevertheless, the private business of the appellant, as a contract carrier, is not subject to certificate control as set out in the Florida statute. Certificate regulation is a regulation of the business of people who use the highways in transport-

ing goods for hire, and not a regulation of the use of the highways. The two powers are separate and distinct. *Buck* v. *Kuykendall* (*supra*); *Frost* v. *R. R. Comm.* (*supra*). Only those businesses "affected with a public interest" can be subjected to the drastic regulation by certificate which goes to the length of prohibition. The mere fact that the appellant uses the highways in the performance of his business undertaking does not "affect his business with a public interest". *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252; *Frost* v. *R. R. Comm.* (*supra*); *Mich. Pub. Util. Comm.* v. *Duke* (*supra*). The appellant is admittedly not a common carrier; nor is his business clothed with a public interest. Such a private undertaking fails to satisfy any of the tests which commonly brand a business as one affected with a public interest. *Tyson* v. *Banton*, 273 U. S. 418, 434. Certainly the public is not interested in the service rendered by the appellant. No one but the Great Atlantic & Pacific Tea Company is dependent upon his business or concerned with respect of its maintenance. This statute is not a regulation of a private carrier *qua* private carrier for reasons above shown.

IV. Assuming *arguendo* that the State of Florida has the power to require a certificate of public convenience and necessity of the appellant as a condition precedent to his use of its highways, the appellant cannot be subjected to the exercise of that power by a statute which, on its face, and as construed, is patently discriminatory. The classification which we particularly challenge is that which exempts carriers who transport between fixed termini or on a regular route, agricultural, horticultural, dairy and fish products. As a regulation of the business of transportation, the only possible end certificate regulation might achieve is to secure adequacy and continuity of service to those who ship by motor carrier.

Neither the type of commodities nor the needs of the persons served by these exempt carriers furnish a reasonable ground on which to rest this classification. Similar exemptions were held invalid in *Franchise Motor Freight Association* v. *Seavey*, 196 Cal. 77, 235 Pac. 1000. Even viewed as a highway measure, for the purpose of conserving the roadbeds and for promoting more safety and less congestion on the public roads, which most certainly the statute is not, the act, nevertheless, remains discriminatory. The classification bears no conceivable relation to the conservation of the public roads of Florida. The ordinary criteria of the size and weight of the vehicles are not considered; the extent of the use is not the test; and even the content of the load in the last analysis is unimportant. If the object of certificate control be in the interest of less congestion and more safety upon the public highways, those trucks under certificate control are no more of a menace, and, in fact, less in many instances, than the trucks outside, if size, weight and frequency of use be any criteria. So far as congestion goes, the number of vehicles of the exempt class operating between fixed termini or on a regular route over the highways of Florida greatly outnumbers those within the operation of the statute. The instant statute whether viewed as a regulation of the business of private carriage, which it admittedly is, or as a highway measure, arbitrarily discriminates between private carriers operating between fixed termini or on a regular route without reasonable ground to justify such classification. There is no difference which bears a just and proper relation to the attempted classifications. The exemptions are mere arbitrary selections.

V. Whether the levy under this statute be regarded as a tax or as a toll, it is patently discriminatory and constitutes

a denial of the equal protection of the laws. The object of this tax is to provide funds to pay for the past and future construction of a state system of roads and its maintenance. Its underlying purpose is to obtain reimbursement from those who use the public roads in the business of transporting for hire. Using the cost to the State as the yard-stick, there is no difference on which to rest this classification. Usage of the public roads by carriers within the statute is no more an expense to the State than usage by those exempt. The classification bears no relation to the wear and tear on the highways occasioned by the vehicles of either group. Weight, size, content of load, and extent of use are not the determining bases. Though the exemptions may indirectly favor the farm, dairy and fishing interests, that of itself, will not sustain a classification otherwise arbitrary. See *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563; *Lossing* v. *Hughes* (Tex. Cr.), 244 S. W. 556. The instant case is distinguishable from the case of *Bekins Van Lines, Inc.*, v. *Riley*, 280 U. S. 80, 82.

VI. The so-called mileage tax imposed by Chapter 13,700, Laws of Florida, 1929, is not a tax, but a toll exacted by the State for the use of all its public highways and is, therefore, invalid, conflicting, as it does, with the Federal Highway Act, Chapter I, Section 9, which provides that all Federal aid highways "shall be free from tolls of any kind". The appellant hauls over many Federal aid highways. The Supreme Court of Florida has held that the state could collect the so-called "mileage tax" from the appellant as "a license tax". The fact that the state court characterized the levy as a tax is not controlling. If, in substance the exaction is a toll, it must be so regarded. The present levy is a "toll" within the rule stated in *Carley & Hamilton* v. *Snook*, 281 U.

S. 66, 73-74. There is no levy unless a public road is used, and the liability for such use attaches instantly. The imposition is based entirely upon the extent of the use, and bears no relation to the business of the carrier. An advance payment of $75 has to be made every three months. And adjustments are then made. A toll is no less such because cash payment at the time of use is not demanded nor made. *Jordan & Skaneateles, Pl. R. Co.* v. *Morley*, 23 N. Y. 552; *Pennsylvania Coal Company* v. *Delaware & Hudson Canal Company*, 10 N. Y. (1 Keyes) 72, 80-81. Nor because it is collected by the state. *Huse* v. *Glover*, 119 U. S. 543, 548. The present imposition is distinguishable from the registration fees in *Carley & Hamilton* v. *Snook* (*supra*), and is a newly devised revenue plan, not a "well recognized type of taxation" existing at the time of and prior to the Federal Highway Act of 1921 (p. 74). It is just such a levy as Congress must have contemplated the states would attempt under the guise of taxation, and for that reason it expressly prohibited the imposition of *"tolls of any kind"*.

VII. The so-called "Mileage Tax" is so arbitrary and oppressive as to be confiscatory. The Record discloses that private carriers will be forced out of business.

VIII. Chapter 13,700, Laws of Florida, 1929, impairs the obligation of appellant's contract and also deprives him of his liberty of contract.

POINT I.

Chapter 13,700, Laws of Florida, 1929, requires the appellant, admittedly a private carrier, to dedicate his property to the quasi-public use of public transportation, thus taking his private property for public use without just compensation, and depriving him of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Florida statute under review is substantially identical with the California statute, which was held unconstitutional by this Court in *Frost* v. *Railroad Commission of California*, 271 U. S. 583. The two statutes are set out in parallel columns in Appendix A, for the purpose of illustrating the striking similarity in their phraseology, purpose and effect.

In the *Frost* case, as here, the controversy arose over the right of a State to require a certificate of public convenience and necessity from a private carrier. In the *Frost* case, the private carrier refused to obey an order of the Railroad Commission ordering him to desist from operating his truck without such a certificate. In the instant case, the appellant was arrested for operating his truck without a certificate of public convenience and necessity in violation of the statutory provisions. In both cases, the Railroad Commissions were empowered to grant certificates of public convenience and necessity or to deny the same or to issue them on such terms and conditions as they saw fit. In both cases, regulation of private carriers by certificates of public convenience and necessity was a phase of regulation inextricably interwoven

with other regulatory provisions respecting rates, tariffs and schedules.

In the *Frost* case, the Supreme Court of California construed the statute as a regulation of the business of those who engaged in transportation of goods for compensation on the public highways.

In the instant case likewise the Supreme Court of Florida held that the subject of the act now under review was the regulation of the business of transportation for hire. This determination was essential to sustain the statute under Section 16 of Article III of the Constitution of the State of Florida, which provides that a bill shall embrace but one subject and matter properly connected therewith; and that the subject matter of an act be briefly embraced in its title. In the court below the point was raised and strenuously argued that Chapter 13,700, Laws of Florida, 1929, violated this provision of the Constitution of Florida, the contention being that the statute in question embraced provisions regulating the business of transportation as well as regulations of the use of the highways. That the regulation of the business of transporting persons or goods for hire is one subject, and the regulation of traffic on the public highways so as to insure safety of travel or to preserve the public highway are separate and distinct subjects was plainly recognized by the Supreme Court of Florida and disposed of in the following language:

> "The title of the act does not express and the body of the act does not embrace, more than one general subject matter of legislation and matter properly connected therewith; therefore, the act does not violate Section 16 of Article III of the Constitution. The title of the act is not misleading. The tax levy is matter properly connected with *the subject of the regulation of the business that is expressed in the title and covered by the statute and the levy but not confined to the expenses of regulation*" (R. 45).

The initial decision of the Supreme Court of Florida therefore was that the subject of the statute was "the regulation of the business * * * of transportation for compensation on the public roads of the State." It was essential for the Court to make this primary determination in order to sustain the constitutionality of the act. Under Florida practice, Section 16 of Article III is frequently invoked, and the courts of Florida, in many cases, have held statutes embracing more than two subjects unconstitutional.*

In another part of the opinion of the Court below there appears an involved sentence which might, at first glance, seem to be in conflict with the express holding of the Court:

> "The requirements as to procuring certificates of convenience and necessity for doing business on the highway and as to the tax imposed on the business may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State in the exercise of police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes" (R. 46).

An analysis of the apparent conflict in the opinion of the Florida court reveals that, in fact, it does not exist. The court held: First, the regulation of the business of transportation for hire was the subject of the Act; Second, the tax levy was matter properly connected with the subject; Third, a certificate of convenience and necessity for doing business on the highway and the imposition of a tax upon such business could reasonably be applied to private carriers

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* See

State v. *Sullivan*, 99 Fla. 1070; 128 So. 478;
Smith v. *Chase*, 91 Fla. 1044; 109 So. 94;
Wade v. *Atlantic Lumber Co.*, 51 Fla. 623; 41 So. 72;
State v. *Burns*, 38 Fla. 367; 21 So. 290

for compensation in the exercise of the police and taxing powers of the state.

Thus the question presented in this case is practically the same as that presented in the *Frost* case. With this difference only: in the *Frost* case, the Supreme Court of California concluded that the legal effect of the provisions of the Act was to subject a private carrier to the same rules and regulations as a common carrier, thus constituting a dedication of private property to the *quasi-public* use of public transportation; whereas, in the instant case, the Florida court concluded that the statute here under review "does not require private carriers to become common carriers", even though the Court specifically held that a certificate of convenience and necessity as set out in the statute could be reasonably required of a private carrier as a condition precedent to his use of the highways.

We respectfully submit that this Court is not bound by any such construction; that such construction is a conclusion of law, properly reviewable here. This is elementary and hardly warrants comment. The appellee, however, will undoubtedly urge that this Court is bound by the State Court's declaration that the statute does not require the appellant to dedicate his private property to a *quasi-public* use. We submit, however, that, it is within the power of this Court to review such a legal conclusion, just as much as it is within the power of this Court to overrule a State court's finding that a statute is not discriminatory when, as a matter of law it is; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; just as much as it is within the power of this Court to inquire, regardless of a State court's finding, whether or not a business is affected with a public interest. *Wolff Packing Company* v. *Industrial Court*, 262 U. S. 522; just as much as it is within the power

of this Court to determine the nature of a levy, whether a tax or penalty, notwithstanding the fact that the state court has construed it to be a tax. *St. Louis Cotton Compress Company* v. *Arkansas*, 260 U. S. 346, 348.

As we understand the rule, this Court is bound by a State court's construction only as to the meaning of a statute and to whom it applies, and not by any legal conclusions deduced therefrom.

So with respect to the instant case, under the familiar rule, this Court is bound by the State court's construction only as to the holding that this private carrier is within the scope of the statute; that the statute is a regulation of the business of transportation for compensation; and that a so-called "mileage tax" and a certificate of public convenience and necessity can be required of this appellant.

As to the nature and legal effect of the certificate requirement and other statutory provisions regulating private carriers, a review by this Court is not only proper, but, in substance, is the justification and foundation of its jurisdiction.

The Supreme Court of Florida has held this much at least: that the State of Florida can require of appellant a certificate of convenience and necessity as set forth within the four corners of the enactment. This, if it means anything, means that the appellant is subjected to the power of the Commission to "issue a certificate of *public* convenience and necessity as prayed for or refuse to issue the same or * * * may issue the same with modifications or upon such terms and conditions as in its judgment the public convenience and necessity may require." In applying for a certificate the applicant is required to file his tariffs and time schedules of operation. He must appear at a hearing before the Railroad Commission. Upon such hearing, the

Commission shall issue or refuse the certificate on such terms and conditions as in its judgment the *public* convenience and necessity may require. The statute lays down certain criteria which the Commission must take into consideration in determining whether or not a certificate shall issue, among others, "general standard of service maintained during this period; the reliability of the applicant and his sense of responsibility towards the *public* as shown during the period of his operation; * * * the effect that the granting of such certificate may have upon other transportation facilities within the territory sought to be served by such applicant, and also the effect upon transportation as a whole within said territory and any other matter tending to qualify or disqualify him as a *common carrier.*" The Commission shall grant a certificate, however, "only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission."

No machinery is set up to deal with private carriers separately from common carriers. The statute makes no distinction between private and common carriers with respect to the certification. In fact, by the express terms of the statute, one of the determinative factors to be considered in passing upon an application for a certificate is that the applicant make a showing which would qualify him "as a *common carrier.*"

The right to engage in the business rests within the discretion of the Commission: the test is the adequacy of transportation facilities by motor carriers in that locality.

To condition an individual's right to engage in the business of a private carrier under contract with a single shipper upon a showing that public convenience and necessity demands such service presents on its face an anomaly and is, in fact, a subversion of a legal device which has hitherto been used exclu-

sively in the regulation of common carriers or businesses affected with a public interest.

The origin of "public convenience and necessity" may be traced to the days when state statutes imposed a duty upon localities to build highways, if demanded by "public convenience and necessity". *Fenwick Hall Co.* v. *Saybrook*, 69 Conn. 32. The formula was incorporated in the regulation of public utilities—*Re Shelton Railroad*, 69 Conn. 626; and expanded so as to prohibit the establishment of such enterprises unless necessary for the public convenience. The underlying purpose of such statutes is to assure adequacy and continuity of service by preventing ruinous competition between those who serve the public.

As lucidly stated by Mr. Justice Brandeis in *Buck* v. *Kuykendall*, 267 U. S. 307, 315, a certificate of public convenience and necessity

> "Is not regulation with a view to safety, or to conservation of the highways, but the *prohibition of competition*. It determines not the manner of use, but the persons by whom the highways may be used * * * [it] is designed primarily to promote *good service by excluding unnecessary competing carriers*."

By the use of this device the State of Florida, as the Court below has ruled, can regulate to the extent of prohibiting the private business of the appellant; can deny him the use of its highways unless he, as a condition precedent, submits to certificate regulation with its attendant requirements of filing rates, tariffs, schedules and making a showing that public convenience and necessity demand his operation.

This, we submit, constitutes a dedication of "his property to the quasi-public use of public transportation" [*Frost* v. *Railroad Commission of California* (p. 591)], notwithstanding any ruling of the Florida Supreme Court to the contrary.

The effect of thrusting a private carrier bodily into regulatory machinery geared for the regulation of common carriers is ably discussed in a leading article in the recent February issue of the Harvard Law Review, Brown and Scott, *"Regulation of the Contract Motor Carrier under the Constitution"*, 44 Harv. L. Rev. 530. The authors examine critically the whole question here involved, and we commend most earnestly their analysis to this Court. The learned authors there ask (pp. 543-544):

> "What is the situation of the private carrier when he becomes a part of such a system? A person desiring to operate under a single contract to haul goods for a corporation or an association still is proposing to transport property for hire. He must, under the ordinary statute, apply for a certificate of convenience and necessity. The test for the grant or refusal of such a certificate is the adequacy of existing service to meet the public demand. If the applicant is to remain a private carrier, though subject to the act, this test is manifestly so inapplicable as to be absurd. The public in general makes no demand for this applicant's service. Such a demand, if made, would be useless unless the applicant ceases to be a private carrier, since by hypothesis he does not hold himself out to serve, and can not be made to serve, any but the party to his single contract. His service will not, if he remains a private carrier, be offered to the public at large. The grant of the certificate, if made, will produce no additional service to the public in general, nor does the present existence of common-carrier service meet the demand which the applicant's customers, for reasons of their own, have manifested for his service.
>
> In short, the principle which underlies the existing forms of regulation is wholly inapplicable to the private carrier. It was not formulated for the purpose of controlling individual contracts to serve individual customers. It was designed to equalize, over a period of time, the need of an entire community for a given type of service and the supply of such service. A contract carrier who can not be forced, even though certificated, to respond to a given public demand has no place in such

> a system. The demand for service to which he responds is not a public one, statistically calculable. It is a single private demand or series of private demands, the recurrence of which can not be predicted and response to which can not be compelled."

They then point out (pp. 445-446), as is the situation here, that

> "In no case has a separate system of control been set up for the private carrier. Ordinarily the principal features of the act are exactly the same as if common carriers alone were included. Regulatory provisions which destroy the very essence of the private carrier's status are made applicable to him as to common carriers."

and conclude (p. 446) that

> "What was true of the California statute is equally true of every statute in which the device has been followed. For the reasons given by the Supreme Court in the *Frost* case all are unconstitutional." [By "device", the authors meant, as stated in a footnote, a regulation of the business of contract carriers by a certificate of public convenience and necessity.]

With but a single exception, the state courts have held that a state has no power to require a certificate of a private carrier such as the appellant.* *Hissem* v. *Guran*, 112 Ohio St. 59; 146 N. E. 808; *Mooney* v. *Tuckerman*, 50 R. I. 37, 144 Atl. 891; *Weaver* v. *Public Service Commission of Wyoming*, 40 Wyo. 462, 278 Pac. 542; *Big Bend Auto Freight* v. *Ogers*, 148 Wash. 521, 269 Pac. 802; *Jones* v. *Ferguson*, 181 Ark. 522, 27 S. W. (2) 96; *Griffin* v. *Murphy*, 51 S. D. 50, 211 N. W. 804; *Purple Truck Garage Company* v. *Campbell*, 119 Or. 484, 250 Pac. 213; *Davis* v. *Metcalf*, 131 Wash. 141, 229

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* For a complete digest of all state statutes fully annotated, see, Brown and Scott, *Regulation of the Contract Motor Carrier Under the Constitution*, Appendix, 44 Harv. L. Rev., at pages 568-571.

Pac. 2; *State* v. *Nelson*, 65 Utah, 457, 238 Pac. 237; *State* v. *Smith*, 31 Ariz. 297, 252 Pac. 1011, 1012; *Towers* v. *Wildason*, 135 Md. 677, 109 Atl. 471.

The sole exception is the Supreme Court of Oklahoma in *Barbour* v. *Walker*, 126 Okla., 227, 259 Pac. 552. It is significant to note that the Oklahoma Court based its decision on the proposition that the certificate regulation there challenged (contrary to the one under discussion here) was a regulation of the highways and not a regulation of the business of private carriage.

A few courts have held that a state may require a certificate of *quasi* common carriers. *Rutledge Cooperative Association* v. *Baughman*, 153 Md. 297, 138 Atl. 29; *Southern Motors* v. *Perry* (D. C. N. D. Ga.), 39 Fed. (2d) 145; *Georgia Public Service Commission* v. *Saye & Davis Transfer Co.*, 170 Ga. 873, 154 S. E. 439. The last two courts in construing the Georgia statute indicated, however, that a certificate could be demanded of a private carrier. But within the past three months, in fact, so recently that their opinions have not as yet been reported, both the last two courts have reversed themselves and have construed the Georgia act as inapplicable to contract carriers. *Johnson Transfer & Freight Lines* v. *Perry* [(D. C. N. D. Ga.), a federal three-judge court, Equity No. 598]; *McIntyre* v. *Harrison* [Supreme Court of Georgia, No. 7887].

We respectfully submit that the legal effect of Chapter 13,700 with respect to this appellant is to require him to dedicate his private "property to the quasi-public use of public transportation" contrary to the principles announced by this Court in *Frost* v. *Railroad Commission of California* (*supra*), and *Michigan Public Utilities Comm.* v. *Duke*, 266 U. S. 570.

POINT II.

Chapter 13,700, Laws of Florida, 1929, as construed by the Supreme Court of Florida, is so vague and indefinite as to deprive the appellant of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

With respect to the other provisions in the statute the Supreme Court of Florida, in its attempt to circumvent the decision of this Court in the *Frost* case, strained to reach a wholly forced construction, stating, with obvious violence to the plain wording of the statute, that the Legislature intended only those provisions, which were "legally applicable to private carriers", to be applicable to private carriers; and those provisions which were "legally applicable only to common carriers to be applied to such common carriers" (R. 46). This, despite the fact that the whole statute is framed to regulate "auto transportation" companies. This, despite the fact that the term "auto transportation company" is specifically defined to include both common and contract carriers. This, despite the fact that each and every provision of the statute is directed and addressed to auto transportation companies, as so defined, to private and public carriers alike and without distinction.

Undoubtedly the Florida Court was in a dilemma. As written, the statute is plain and clear enough encompassing, as it does, both private and common carriers within the scope of all its provisions and, so read, is unconstitutional under the *Frost* decision. In trying to save this statute from the fate of the California Statute, ineffectual though it was, the

Florida Court is impaled upon the other horn of the dilemma. As construed by the State Court, the statute, otherwise definite, becomes so vague and indefinite as to deprive the appellant of his liberty and property without due process of law. By such construction the appellant, and others similarly situated, are not informed as to what standard of conduct is required of them lawfully to pursue their business; no norm of conduct is given them by which they can measure the legality of their acts.

Section 13 of Chapter 13,700, Laws of Florida, 1929, makes it a crime for anyone to violate any provision of the Act. The entire Act, then, must be viewed in the light of a penal statute.

Penal provisions, in order to satisfy the first essential requirement of due process under the Fifth or under the Fourteenth Amendment, must be so clearly and definitely expressed that an ordinary man can determine in advance whether a contemplated act is within or without the law. On the other hand, they must not be so broad and elastic in their terms as to compel a man to guess at his peril whether his act is in violation of them. In short, if deviation from a standard provokes a penalty, the standard must be definitely fixed. *United States* v. *Cohen Grocery Company*, 255 U. S. 81, 89; *Weeds, Incorporated* v. *United States*, 255 U. S. 109; *Cline* v. *Frink Dairy Company*, 274 U. S. 445, 454; *Connally* v. *General Construction Company*, 269 U. S. 385; *International Harvester Company* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634, 638; *American Seeding Machine Company* v. *Kentucky*, 236 U. S. 660, *United States* v. *Capitol Traction Company*, 34 D. C. Appeals, 595; *Louisville & N. R. Company* v. *Railroad Commissioner of Tennessee*, 19 Fed. 679; *Tozer* v. *United States*, 52 Fed. 917; *Common-*

wealth v. *Louisville & N. R. Company,* 46 S. W. (Ky.) 700. By the same token, a statute, otherwise definite is unconstitutional if made vague and indefinite by construction. *United States* v. *Reese,* 92 U. S. 214, 221; Trade Mark Cases, 100 U. S. 82, 98; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, 517.

In the latter case, the late Mr. Chief Justice Taft, said, on page 522:

> "The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity".

And this rule should be most strictly applied to statutes which create new offenses, that is, where the sovereign state for the first time is attempting to punish a course of conduct which theretofore was recognized as legal. *United States* v. *Reese, supra; United States* v. *Brewer,* 139 U. S. 278; *United States* v. *Sharp,* Pet. CC. 118, 122 (Fed. Case No. 16,264); *Northern Pac. Ry. Co.* v. *U. S.,* 213 Fed. 162.

As the statute now stands construed, a private carrier is without guide as to what course to pursue in order to carry out his contract and earn his living. If he guesses wrong, he is faced with a jail sentence, a heavy fine, or both. If he guesses right, he will be vindicated only after endless litigation, and burdensome expense. If he supinely submits to all the demands of the statute, he gives up his inherent constitutional rights. As it is, he does not know what is required of him. Shall he give a bond in such amount as the Commission may fix to indemnify the public and those whose property he carries against damages for his negligence? Are his rates and charges subject to the supervision of the Commission and his whole business conduct to

such rules and regulations as the Commission may prescribe, which rules and regulations are by the statute presumed in advance to be not only within the power of the Commission, but such "as ought to have been made in the premises"? Is he permitted to deviate from the route described in his certificate only in case of a compulsory detour or to points not on the exclusive route of any other certificate holder? Must he seek the approval of the Commission for each new contract he makes with his employer by which his compensation is changed or modified? To these and many like questions the opinion of the Supreme Court of Florida furnishes no answer. Yet if he is subject to the act as written, the reply can only be "Why not"?

There is very little difference between such a statute and the Chinese Penal Code referred to by Judge Brewer, later Mr. Justice Brewer, in *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. 866, 876:

> "In this [Lieb. Herm., 156] the author quotes the law of the Chinese Penal Code, which reads as follows: 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows'".

POINT III.

Chapter 13,700, Laws of Florida, 1929, being a regulation of the business of transportation, and not a highway measure, the State of Florida cannot subject the appellant's business, unaffected, as it is, "with a public interest" to certificate regulation in contravention of the Fourteenth Amendment to the Constitution of the United States.

Assuming, *arguendo*, that the legal effect of Chapter 13,700, Laws of Florida, 1929, is not to subject the appellant to the same obligations and regulations as common carriers, we, nevertheless, submit that the private business of the appellant, as a contract carrier, is not subject to the certificate control set out in the Florida statute.

We are not here concerned with the power of the State of Florida to regulate traffic on its highways. The power of a State to impose reasonable regulations upon the use of the highways by private carriers is not questioned. Special licenses may be required; maximum size of equipment, breadth of tires may be specified, together with safety devices and speed limits, insurance and safety bonds; all conducive to the public welfare by promoting safety on or conservation of public highway.

But the power of the State of Florida to regulate the business of appellant's private undertaking, as a business, raises a different series of questions.

That the statute now under review is a regulation of the business of transporting for hire and not a highway measure is no longer open to question. The Supreme Court of Florida has expressly held it to be such (*supra*, pp. 15-17). And

an analysis of the function and genesis of certification shows that it is not a highway measure.

The power of a State to require a certificate of public convenience and necessity is derived not from the power to regulate the use of the public highways but rather from the power to regulate the business of those who are engaged in using them. *Buck* v. *Kuykendall* (*supra*). The two powers are wholly unrelated, and flow from separate and distinct sources. The *Frost* case is conclusive on this point (pp. 593-4).

Whether or not the state has the power to regulate any particular business, for economic reasons, in contradistinction to traffic purposes, depends in the last analysis, upon the character of the business to be regulated, the test always being whether or not the business in question is "affected with the public interest".

In *Tyson & Bro.* v. *Banton*, 273 U. S. 418, 434, this Court after an exhaustive analysis of the pertinent cases framed the test as follows:

> "A business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."

The appellant is concededly a private carrier; he has never held himself out as a common carrier; he has never "devoted his property to a public use". Certainly the public is not interested in the service rendered by the appellant. No one but the Great Atlantic & Pacific Tea Company is dependent upon his business or concerned in respect of its maintenance. Such a private undertaking wholly fails to satisfy any of the tests which commonly brand a business as one affected with the public interest.

The mere fact that the appellant uses the highways in the performance of his business undertaking does not "affect his business with a public interest". To the contrary are the express holdings of this Court in *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252; *Michigan Public Utilities Comm.* v. *Duke* (*supra*); *Frost* v. *Railroad Commission of California* (*supra*).

Inasmuch as the business of the appellant is unaffected with a public interest, the State of Florida is without power to impose on him the extraordinary regulation of certification, drastic even to the lengths of prohibition. This is no mere licensing requirement. This does not involve a question of registration solely. This is not a regulation of a private carrier *qua* private carrier, as suggested by Mr. Justice Sutherland in the *Frost* case (p. 592). The system for certificate regulation provided for in Section 13,700 does not segregate the method and manner of certifying private carriers from common carriers. Even as construed by the Supreme Court of Florida, the test for one is the same as for the other—public convenience and necessity, the adequacy of existing service. The one vital issue is whether or not an individual engaging in a business strictly private can be forced to abandon his means of livelihood in the cause of adequacy and continuity of service to the public. So to deny him his earning power in this legitimate line of business is as much a requirement that he dedicate his property to the public use as would be the confiscation of his trucks themselves.

There are no abuses here which call for this drastic regulation. The demand for regulation by certificate or, in fact, any regulation whatsoever, is not made by the shipper* or by the business world,* or by those with whom the contract

* See I. C. C. Hearings, Docket 28,400.

or common carrier deals. The only apparent beneficiaries are the railroads.

Surely, a certificate of public convenience and necessity cannot be constitutionally required of appellant with the effect of prohibiting, in the interest of competing carriers, the prosecution of his enterprise. To extend the monopolies conferred upon public service companies, by forbidding undertakings, neither noxious nor detrimental to the public welfare, is a serious invasion of the fundamental rights of an individual. The fact that the appellant may be employed by one who is a potential customer of a common carrier of freight does not warrant his exclusion for the benefit of competing carriers. If that doctrine is sound, it could be invoked, when carried to its logical conclusion, to force individuals to ship by a common carrier and not by their own trucks.

The conclusions of Messrs. Brown and Scott are so ably stated that we take the liberty to quote again from their article:

> "Considered individually, therefore, the provisions both for the regulation of rates and practices and for the requirement of certification are regulations of the business, and, in application to contract carriers, invalid, since the business of those carriers is not affected with a public interest. In practice, however, they are not to be regarded individually, but as complementary and essential components of a unified regulatory system. A statute providing for certification intended to result in a limitation of competition, tending toward monopoly, plainly must embrace rate regulation as a protection to the public. If it be assumed, *arguendo*, that a constitutional method of exclusion of some of those seeking to engage in the business of contract carriage could be devised, it is a necessary corollary that regulation of rates and practices must accompany it. Otherwise the exclusion of free competition, if effective, would be mis-

chievous. One consequence is that in the case of a statute embracing both rate regulation and certification, the failure on constitutional grounds of the provisions regarding rates and practices must, as a matter of necessary interpretation, carry down with it the certification provisions" (44 Harv. L. Rev., 565, 566).

We submit, therefore, that the State of Florida cannot subject the appellant's business to certificate regulation as required by Chapter 13,700, Laws of Florida, 1929, and in consequence the statute is unconstitutional, violating as it does the Fourteenth Amendment to the Constitution.

POINT IV.

To require a certificate of public convenience and necessity of the appellant, and to exempt other private carriers similarly situated from such regulation is to deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Assuming *arguendo* that the state of Florida has the power to require a certificate of public convenience and necessity of the appellant as a condition precedent to his use of its highways, we submit, nevertheless, that, in the instant case, the appellant cannot be subjected to the exercise of that power by a statute which, on its face, and as construed, is patently arbitrary, discriminatory and unreasonable.

Under the statute, not all private carriers are subjected to regulation; indeed, not all common carriers are subjected to regulation. In the initial definition of auto trans-

portation companies, all carriers, both common and private, who do not operate between fixed termini or over regular route are outside the scope of the statute. That part of the statute, here challenged, reads (Sec. 1(h)):

> "The term 'Auto Transportation Company,' as used in this Statute shall not include corporations or persons * * * engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fish and salt fish and oysters and shrimp from the point of production to the assembling point en route to primary market or to motor vehicles used exclusively in transporting or delivering dairy products."

Exempt from the operation of the statute, among others, are those carriers engaged in the business of transporting the commodities of the principal industries of Florida; in short, the exceptions swallow up the rule.

It should here be pointed out that we are not challenging the constitutionality of this statute upon the ground that shipper-owned vehicles in every line of business are excluded from its regulation. Nor solely upon the ground that the statute discriminates without justification between carriers, public and private, who operate between fixed termini or on a regular route, and carriers, public and private, who do not. Our attack is based upon a discrimination even more fundamental and less justifiable—a discrimination between private carriers operating between fixed termini or over a regular route, and engaged in the same business of transporting for hire, and differing only in the kind of commodities making up their loads.

A state, in the exercise of its police power, can undoubtedly classify the subjects of regulation; but such classification must be based upon some reasonable ground—some difference which bears a just and proper relation to the at-

tempted classification—and is not a mere arbitrary selection. *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540; *Truax* v. *Corrigan*, 257 U. S. 312, 332; *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 155; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 111.

No justifiable basis for classification here exists. None is set forth in the Court's opinion. There a conclusion is merely stated and nothing more. No reasons are suggested to support this conclusion nor can any be spelled out.

It cannot be said that the basis of classification rests upon the fact that carriers of agricultural, horticultural, dairy and fish products do not operate between fixed termini or on a regular route, whereas the other carriers so do. That there are such carriers of agricultural, horticultural, dairy and fish products who do operate between fixed termini and on a regular route is implicit in the terms of the statute. Otherwise, there would have been no necessity for the legislature to carve out the present exemptions, inasmuch as the initial definition of an auto-transportation company is specific enough to exclude, without need of specific exemption, all carriers, both private and common, who do not operate between fixed termini or over a regular route.

Perhaps the Florida Legislature, in carving out these exceptions, intended to encourage and favor the principal industries of the state to the end that their products might be placed within the ready reach of all, and their production fostered and assisted. This suggestion, however, strikes at the root of every argument advanced by the advocates of certificate control, and is based on the premise that the interests of the shipping and consuming public lie in non-regulation.

As a regulation of the business of transportation, the only possible end certificate regulation might achieve is to secure adequacy and continuity of service to those who ship by motor carrier. The whole theory of such control is that the shipping interests will be best served by preventing ruinous competition between motor carriers, which in the end would result in a break down of motor transportation facilities. If these premises be accepted, and they must if certificate control as a regulation of business is to be sustained, it is difficult to perceive why the carriers hauling farm, dairy and fish products are not here favored at the expense of the producers of those commodities, and why non-regulation of such carriers is not a detriment, rather than a benefit, to the interests purported to be encouraged; and if these premises be sound, it is difficult to perceive why carriers, private and public, who do not operate between fixed termini or on a regular route, are not subjected to regulation. With them outside the statute, no possible hope exists of eliminating ruinous competition.

But even if the major industries of Florida were to be favored by these exemptions, this, in and of itself, would not save such exemptions from being arbitrary and unreasonable. Exceptions designed for the benefit of agricultural, dairying, or fishing interests, have been held to be discriminatory when not resting upon some reasonable basis of distinction. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563-564.

The classification attempted by the Florida statute cannot be grounded on the difference between the service demanded of carriers within the statute and the service demanded of those without. Adequacy and continuity of service are no more essential to the shippers of ordinary freight than to the farmers, dairymen and fishing interests.

A breakdown of motor transportation facilities would undoubtedly affect the producers of raw materials as seriously as anyone else. It is common knowledge that the products of the farms, the orchards, the dairies and the fisheries are perishable commodities, calling for, as much, if not more, expedition than the general run of staple goods hauled. Certainly no less. On the very hypothesis that certificate regulation will prevent any shortage or inadequacy of motor carrier service, and is a beneficial regulatory measure, there exists no reasonable basis for including one group of carriers within the operation of the statute and leaving another group arbitrarily without. Neither the type of commodities nor the needs of the persons served by these exempt carriers furnish a reasonable ground on which to rest this classification. As a regulation of the business of contract motor transportation, the statute, therefore, is highly discriminatory, subjecting as it does, one group of carriers to drastic regulation even to the extent of prohibition, and permitting another group to escape such regulation solely on the ground that they transport farm, fish and dairy products exclusively.

Similar exemptions were held invalid in *Franchise Motor Freight Association* v. *Seavey*, 196 Cal. 77, 235 Pac. 1000. There the Supreme Court of California decided that the exemption of carriers, engaged exclusively in the business of transporting farm products, implements of industry or other farm necessities to and from the farm and initial shipping

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* *Stats. of California*, 1923, p. 644:

"Each application for a certificate of public convenience and necessity, * * * must be accompanied by a fee of fifty dollars; provided, however, the movement of products or implements of husbandry and other farm necessities from farm to farm or from and to farm to and from loading point, warehouses or other initial point shall not be subject to the regulations of this act."

points, from certificate control constituted a denial of the equal protection of the law, saying on page 1004:

> "We do not mean to infer that every classification, based upon a distinction between farmers on the one hand and all other persons on the other, is unconstitutional, but we are impelled to conclude that no natural, intrinsic, or constitutional distinction is to be found as a basis for the exemption of the transportation companies described in the 1923 amendment, supra, from the regulations prescribed in the Auto Stage and Truck Transportation Act, and that such attempted exemption is violative of the Fourteenth Amendment to the federal Constitution, and of like provisions in our state Constitution."

Even viewed as a highway measure, which most certainly the statute is not, the act, nevertheless, remains discriminatory.

If the object of certificate control is assumed *arguendo* to be the conservation of the public highways, any classification of carriers must rest upon some difference with respect to the wear and tear upon the public roads.

The instant classification is entirely without this foundation. At the risk of seeking to demonstrate the obvious some illustrations may be given:

> (1) Private carrier, X, is under contract with the Florida Orange Company to haul its oranges from its orchards to the primary market, Jacksonville. X is not subject to regulation.
>
> Private carrier, A, operating a truck of the same size, equipped with the same tires is under contract with the A. & P. Company to transport the same oranges to its retail stores, which are located along the same highway which X uses. A is subject to regulation, though the extent of this use and the weight and even the subject matter of his load are in no way different from X's.
>
> (2) Private carrier, Y, is under contract to haul each day fish, heavily iced, from the place of production to Jacksonville. His truck and load weigh six thousand pounds. Y is not subject to regulation.

Private carrier, B, is under contract daily to carry pasteboard cartons from Jacksonville over the same highway to a factory located at the place where Y begins his hauling. The aggregate weight of truck and load is three thousand pounds. B's truck is the same size, model and make as Y's. B is subject to regulation; though, as a matter of fact, his usage will occasion less wear on the roadbed than will Y's, since his load is lighter.

(3) Private carrier, Z, is under contract to haul exclusively dairy products in his *four-ton* truck daily between fixed termini. Z is not subject to regulation.

Private carrier, C, ninety-five per cent of whose business is transporting on a regular route similar dairy products in a *one-ton* truck is subject to regulation for the reason that five per cent of his business consists in bringing back groceries from the primary market to the dairies which have him under contract.

Illustrations might be multiplied. These are sufficient to show that the classification bears no conceivable relation to the conservation of the public roads of Florida. The ordinary criteria of the size and weight of the vehicles are not considered; the extent of the use is not the test; and even the content of the load in the last analysis is unimportant.

Finally if the object of certificate control be in the interest of less congestion and more safety upon the public highways, the above illustrations equally serve to point out that those trucks under certificate control are no more of a menace, and, in fact, less in many instances, than the trucks exempted, if size, weight and frequency of use be any criteria. A truck under hire takes up no more room than one driven by its owner; and trip for trip a vehicle running between fixed termini wears the roadway no more than its rambling fellow traveler. Certainly as between trucks operating between fixed termini or on a regular route there can be no difference in wear and tear on the roadbeds; and certainly

between trucks *inter se* operating between fixed termini or on a regular route there can be no difference in any potential danger to the public. So far as congestion goes, the number of vehicles of the exempt class operating over the highways of Florida greatly outnumbers those within the operation of the statute. This Court will take judicial notice that in Florida the principal commodities transported are the products of agriculture, horticulture, dairy and the fishing industries.

All of which goes to prove the speciousness of any attempt to justify the exemptions either in the interests of conserving the public roads, or of making them safer and less congested.

In *Frost* v. *Corporation Commission*, 278 U. S. 515, 524, a statute requiring a certificate of public convenience and necessity from an individual who operated a cotton gin, but exempting corporations from such a requirement, was held to be discriminatory and a denial of the equal protection of the laws. Mr. Justice Sutherland has characterized the requirement of a certificate of public convenience and necessity as "an onerous restriction upon the right to engage in a public business" with "a greater burden laid upon" those within the statute than upon those without. With respect to the statute there under review, he said, on page 524:

> "That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based on no real or substantial differences having reasonable relation to the subject dealt with by the legislation."

We submit that the instant statute whether viewed as a regulation of the business of private carriage, which it

admittedly is, or as a highway measure, arbitrarily discriminates between private carriers *inter se* without reasonable grounds to justify such classification.

POINT V.

By imposing an unreasonable and arbitrary tax upon the appellant and exempting others similarly circumstanced from the burdens of such taxation, the State of Florida has denied the appellant his right to the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

All the arguments advanced under Point III, urging that there is no reasonable basis for distinguishing between the two classes of contract carriers for purposes of regulation apply with equal force to the imposition of the so-called "mileage tax".

The Supreme Court of Florida has characterized the present "mileage tax" as a levy "laid on the business" of intrastate commerce, "calculated according to the road miles that are covered" (R. 46). Assuming for the sake of argument only, that the nature of the instant levy is a tax, and not a toll, as we shall later contend, we submit that the tax in its incidence arbitrarily discriminates against the appellant and denies him the equal protection of the laws.

While it is true that a state is sometimes granted more latitude in classification for the purpose of taxation than for mere regulatory purposes, the equal protection clause of the Fourteenth Amendment operates as a check upon this freedom. There is a point beyond which a state cannot go

without denying the equal protection of the laws. A state, therefore, is not at liberty to resort to classification that is palpably arbitrary. The rule is generally stated to be that the classification "must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240; *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 75; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412.

The object of this tax is set forth in Sections 15 and 18 of the Act. It is to provide funds to pay for the past and future construction of a state system of roads and its maintenance. The underlying purpose of the tax is to obtain reimbursement from those who use the public roads in the business of transporting for hire. The statutory disposition of the moneys is conclusive on this score.

If any such burden is to be laid upon carriers for hire, we submit that it should fall upon all those similarly circumstanced—upon all those who use the public roads in their business of transportation alike and without favor. If such a "tax" is exacted on the theory, as this tax admittedly is, that those businesses which profit by use of a public improvement should contribute to its initial cost and defray the expenses of its maintenance, it is difficult to perceive how any classification of carriers for such taxation into those operating and those not operating between fixed termini or over a regular route on the highways of Florida, could be anything but arbitrary. Certainly, the classification here challenged is arbitrary, unreasonable and capriciously discriminatory,

where even between carriers operating between fixed termini or on a regular route, the statute makes an artificial distinction with respect to the mileage tax.

Using the cost to the State as the yard-stick, there is no difference on which to rest this classification. Usage of the public roads by carriers within the statute is no more an expense to the State than usage by those exempt. As shown by the illustrations in Point III (*supra*, pp. 37-38), the classification bears no relation to the wear and tear on the highways occasioned by the vehicles of either group. Weight, size, content of load, and extent of use are not the determining bases.

The capricious incidence of this "tax" is further shown by recognition of the fact that the businesses of the greater number of carriers for hire who operate between fixed termini are relieved of this burden, while upon the remainder only is saddled the onerous charge. Moreover the pleasure car, the owner-driven truck and the seeker for random employment travel the roads tax free.

The burden is very real, as we point out in Point VI (*infra*, pp. 54-57). As the "tax" now stands, it will preclude a private carrier who does not transport farm, dairy and fish products exclusively, from ever making competitive bids against an exempt carrier, to obtain a contract to haul such products.

Perhaps the producers of those commodities, which under the statute are carried by tax exempt carriers, may be indirectly aided by these exemptions, in that the cost of shipping their products by motor truck is not to be increased by the tax. Nevertheless, a desire to favor agricultural and kindred interests does not of itself permit a state legislature for tax purposes to make classifications otherwise arbitrary. In *Lossing* v. *Hughes* (Tex. Cr.), 244 S. W. 556, 560, a statute

was held unconstitutional which imposed a license tax upon all "owners * * * of motor trucks and tractors, except those who operate them for agricultural purposes." In its opinion, the court characterized the statute and its "discriminations" as "class legislation", saying that it could "conceive of no enactment which more clearly falls within that category." In no uncertain terms, the court went on to say:

> "Without indicating any reason for it, the Legislature by the provisions of this law imposes penalties and restrictions upon the property rights which inhere in the ownership and operation of commercial motor vehicles, and exempts motor vehicles used in agricultural pursuits from such penalties and restrictions; and, equally without indicating any reason for it, makes criminal the use of certain motor vehicles for commercial purposes and, at the same time, makes lawful the use of the same vehicles for agricultural purposes upon the same roads. No reason suggests itself to us as a justification of such discriminations. In these respects, as well as in other respects apparent at a glance, the owner and users of commercial motor vehicles are made the victims of capricious discrimination."

Here, likewise, the appellant and other private carriers within the statute are "victims of capricious discrimination."

See also, *Quaker City Cab Co.* v. *Pennsylvania* (*supra*); *Connolly* v. *Union Sewer Pipe Co.* (*supra*); *Franchise Motor Freight Ass'n* v. *Seavey* (*supra*); *Kellaher* v. *City of Portland*, 57 Ore. 575, 112 Pac. 1076; *Valentine* v. *Berrien*, 124 Mich. 664, 83 N. W. 594; *Bacon Service Company* v. *Huss*, 199 Cal. 21, 248 Pac. 235; *Weimar Storage Co.* v. *Dill* (1928, N. J.), 143 Atl. 439.

The recent decision in *Bekins Van Lines, Inc.*, v. *Riley*, 280 U. S. 80, 82, is clearly distinguishable from the instant case. This Court recognized "that a marked distinction exists between common and private carriers by auto vehi-

cles" for purposes of a tax laid on the gross receipts of a common carrier's business; and that such difference constituted a reasonable basis of classification. The distinction was bottomed on the ground that operation by common carriers "between fixed termini" in the "use of the highways", was "regular and frequent and therefore unusually destructive thereto", and that such operation would more likely "expose the public to dangers exceeding those consequent upon the occasional movements of other carriers". In the instant case, the cleavage is not between common and private carriers; nor, indeed, solely between carriers operating between fixed termini or over a regular route and carriers who do not. Here carriers, who do operate between regular termini and on a regular route, are exempt from the operation of the statute merely because they transport exclusively certain designated commodities. The differences, therefore, by which the classification was justified in the *Bekins* case are not here present. As shown above, the attendant consequences of the instant classification do not tend to preserve a highway from destruction or to protect the public from the dangers occasioned by movement of carriers.

We submit, therefore, that whether the levy under this statute be regarded as a tax or as a toll, it is patently discriminatory and constitutes a denial of the equal protection of the laws.

POINT VI.

The so-called Mileage Tax imposed by Chapter 13,700, Laws of Florida, 1929, is not a tax but a toll exacted by the State for the use of all its public highways and is, therefore, invalid, conflicting, as it does, with the Federal Highway Act, Chapter I, Section 9, in contravention of Article VI, Section 2, of the Constitution of the United States.

It was urged below that the so-called mileage tax was in fact not a tax but a toll exacted by the State for the use of all public highways in the State, and was in conflict with Section 9, Chapter 1, of the Federal Highway Act, which provides:

> "All highways constructed or reconstructed under the provisions of this Chapter shall be free from tolls of any kind."

In the petition for writ of *habeas corpus* which was duly sworn to, it was alleged that "many of the roads over which petitioner hauls are Federal Aid Roads" (R. 4).

This material allegation or averment was not denied.

It is elementary that any allegation or assertion not denied is admitted to be true.* The Supreme Court of Florida accepted as a fact the above statement, but took exception only to the fact that it did not appear that all of the roads over

* See *Whitten* v. *Tomlinson*, 160 U. S. 231, 240.

which petitioner operated were Federal highways, saying (R. 47):

> "It is not shown that the petitioner operates only upon highways that have been constructed or reconstructed under the Federal Highway Act."

The roads over which petitioner operated are fully set forth in the Record (R. 8). All of these roads are Federal aid highways, except the streets of the City of Jacksonville. Of this fact the Court below must have taken judicial notice.

If, however, the so-called "tax" is not a tax but is a toll, it is immaterial that some of the roads or a few miles of some one road were not constructed with Federal funds in view of the fact that many of the roads over which the petitioner operated were constructed or reconstructed under the Federal Highway Act.

The Supreme Court of Florida has held that the State of Florida can collect a levy measured by the "road miles that are covered" over all highways within the state, including Federal Aid Highways. This, the Court said, the State could do, "even if the 'mileage tax' as here imposed * * * be regarded as a toll under the Federal Highway Act" (R. 46-47). With all deference to the learned State Court, we submit the Court was led into error. If the State is collecting tribute in contravention of the Federal laws and Constitution, it matters not how much or how little the unauthorized exaction may be. The complete answer to the State Court's holding is found in *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, 431, where it was held that any exercise of an unauthorized power to collect tribute, however slight, should be condemned, the theory being set out in Chief Justice Marshall's famous

aphorism "That the power to tax involves the power to destroy".

If the "mileage tax" is not a tax but a toll, the Florida statute clearly conflicts with the Federal Aid Highway Act. The question here presented is whether or not the levy is a toll within the meaning of the Federal Highway Act. It is significant that Congress was not content in its prohibition to use the term "toll" alone. It went further and specifically prohibited "tolls of any kind". In determining whether or not a levy is a toll or a tax, the term "toll" should, therefore, be broadly construed and any doubts with respect to its nature resolved in favor of a "toll".

The fact that the State Court characterized this levy as "a license tax imposed upon the interstate business of transportation for compensation on the public roads of the State" is not of itself conclusive. This Court has said with great clarity in *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625:

> "As it many times has been decided, neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 298; *Galveston, Harrisburg, &c., Ry. Co.* v. *Texas*, 210 U. S. 217, 227."

The fact that the levy is called a tax is not in itself sufficient to change the intrinsic nature of the imposition. *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 36, 37; *Lipke* v. *Lederer*, 259 U. S. 557, 561-562; *Hill* v. *Wallace*, 259 U. S. 44, 66-67; *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346, 348. When determining the nature of a levy, matters of substance must be regarded and not mere form. *Weiss* v. *Stearn*, 265 U. S. 242, 254. If, in substance, the exaction is a toll, it must be so regarded.

A toll* is a demand of proprietorship, while a tax is a demand of sovereignty. *City of St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92, 97; *Cooley on Taxation*, Vol. I, Section 14, 4th Edition. The amount of toll is determined by the cost of the property or of the improvements and the extent of use; while taxes are levied for the support of the Government and the amount is regulated by the necessities of the Government. *Sands* v. *Manistee River Improvement Company*, 123 U. S. 288, 293; *Huse* v. *Glover*, 119 U. S. 543, 548.

In the opinion below it was asserted that the imposition was not a toll because it was not "collected for mere passage over the roads or exacted when and as the privilege of passage is exercised". In other words, the manner and time of collection was considered controlling.

The correct rule has recently been pronounced by this Court, and, as we understand it, is this: When the charge is based upon the extent of use, and the liability is incurred when, and as, the use is enjoyed, even though payment to satisfy such liability is not then made, the imposition is a toll

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* Citation of authority hardly seems necessary to expound the common law conception of a "toll". See, however:

New York, Lake Erie & Western Railroad Company v. *Pennsylvania*, 158 U. S. 431, 435-536;

Lake Superior and Mississippi Railroad Company v. *United States*, 93 U. S. 442, 457-459;

Reading Railroad Company v. *Pennsylvania*, 15 Wall. 232, 277-278;

Geiger v. *President, Etc., of Perkiomen & R. Turnpike Road*, 167 Pa. 582; 31 Atl. Rep. 918, 919;

The Pennsylvania Railroad Co. v. *Sly*, 65 Penn St. 205;

Boyle v. *The Philadelphia and Reading Railroad Company*, 54 Penn. St. 310, 313-314;

McNeal Pipe & Foundry Co. v. *Howland*, 111 N. C. 615; 16 S. E. 857, 860.

and not a tax. *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 73-74.

In the present case there is no levy unless a public road is used, and even then the imposition is based entirely upon the extent of the use. The levy bears no relation to the business of the carrier. Its amount is not determined by the volume of business. Nor is it measured by gross income, net receipts or any factor connected with the business as such. The sole determinative factor is the extent of the use of the public highway. If the road is used one mile, the imposition is one cent, and if the road is used one hundred miles the imposition is one dollar, whether or not the vehicle is loaded to capacity or empty. The imposition is solely "calculated according to road miles that are covered".

There are two prevailing rates with respect to trucks: "One cent per mile on all trucks with a loaded capacity of less than 5,500 lbs. * * * two cents per mile on all trucks with a loaded capacity of 5,500 lbs." (Sec. 15). A trailer is rated on the same basis as a truck. The passage of a truck and trailer is counted as two vehicles and the charge is calculated accordingly. The weight and size of the vehicle fixes the rate scale; the number of vehicles determines the units; and the imposition is calculated by the number of "road miles covered". Every essential characteristic of a toll is here present.

In the instant case, it is true that the levy is not collected at the time of passage. However, as a condition precedent to the use of the highways, it is required that an advance payment be made of $75.00 every three months (Sec. 15). Adjustments are made from time to time in order to balance the books. At the time of these periodical settlements the

extent of the use is the controlling factor in determining the amount of the charge. Because there is no toll gate at every mile post on the public highway; and because the one cent is not actually collected as, and when, each mile of the highway is traveled, the levy cannot be denied the essential characteristics of a toll. The charge may be collected at the end of each mile or one hundred miles, or at the end of each day or each ninety days, but so long as the charge is based upon the extent of the use, it is a toll and not a tax.

A toll is no less such because cash payment is not demanded nor made. Credit was often extended to those who used turnpikes or canals, and an action at common law would lie for compensation for such use. *Jordan & Skaneateles, Pl. R. Co.* v. *Morley,* 23 N. Y. 552. This question was discussed in *Pennsylvania Coal Company* v. *Delaware & Hudson Canal Company,* 40 N. Y. (1 Keyes) 72, 80-81, where the Court of Appeals said:

> "It is very true that tolls ordinarily are payable on demand or when the benefit for which they are demandable is received. At common law a distress was incident to toll or where the toll was for the passage or the like, the passage could be refused until the toll was paid. * * * The argument for the defendants to show that in all the cases specified by the contract now before us, the compensation for the passage of the plaintiffs' boats must be made contemporaneously, rests almost entirely upon the force of the word 'toll' in the contract as necessarily importing an immediate payment. It is one answer to this argument that the compensation for which this contract stipulates would be legitimately and properly called toll although not paid or exacted at once. A case might readily be supposed in which the whole compensation for a year's use of the canal might be payable in gross, as toll for a year, and not tolls for the several passages."

In *Kane* v. *New Jersey*, 242 U. S. 160, 168, Mr. Justice Brandeis took occasion to indicate that a levy "based on mileage" is a "toll".

It will doubtless be urged that the present levy is no toll because the charge is not made against every one using the public roads. Such argument but further illustrates the unreasonable and discriminatory nature of the imposition. Such an attack is directed at the arbitrary incidence of the levy, not at its inherent characteristics. No one will deny that a charge of one dollar for passage over a bridge is a toll, even though certain persons or vehicles may have free passage. It has long been a custom, on toll roads and toll bridges, to exempt from tolls, funeral processions, those engaged in charity work and ministers of the gospel.

The levy in question is materially different from gasoline taxes. The gasoline tax does not measure the extent of the use of the highway. One motor vehicle may use one gallon to ten miles and another one gallon to twenty miles. Gasoline is used in motorboats, aeroplanes and stationary engines. Such a levy is based upon the extent of the use of gasoline and not upon the extent of the use of the highway.

The instant case presents an entirely different issue from that in *Carley & Hamilton* v. *Snook* (*supra*), which involved flat registration fees, not impositions calculated on the road miles covered. In pointing out why such registration fees were not "tolls in the commonly accepted sense of a proprietor's charge for the passage over a highway or bridge", this Court stated (pp. 73-74) the distinguishing characteristic of a toll to be a charge "exacted when and as the privilege of passage is exercised", based on "the extent or frequency of the use of the highways".

The imposition in the present case is not open to the objection there raised by this Court concerning the improbability of any Congressional intent to procure "without more explicit language" the abandonment of the registration fees, a "well recognized type of taxation." The present levy is a newly devised revenue plan, not a "well recognized type of taxation" existing at the time of and prior to the Federal Highway Act of 1921 (p. 74), and is just such a levy as Congress must have contemplated the states would attempt under the guise of taxation, and for that reason expressly prohibited the imposition of *"tolls of any kind"*.

The so-called "mileage tax" here under review approximates an old-fashioned toll as clearly as any imposition could in this twentieth century. It can hardly be argued that Congress in 1921 had in mind only those levies which might be collected in the manner, under the same conditions, with the same appurtenances present as existed on a nineteenth century turnpike. In the march of events, meters have taken the place of toll-gates, and accountants the roles of gate-keepers. The charges exacted for passage over the roads remain, nevertheless, tolls in every sense of the word "toll" in the Federal Highway Act. Inasmuch as the present imposition is based on the number and size of the vehicles passing, and is measured by the extent of their use of the highways, and inasmuch as 95% of the levies collected goes to pay for the past, present and future maintenance and construction of the improvements used, no distinction, we submit, can be drawn between the present levies and "tolls in the commonly accepted sense of a proprietor's charge for the passage over a highway or a bridge". The fact that the proprietor in the instant case happens to be the State of Florida is immaterial. *Huse* v. *Glover*, 119 U. S. 543, 548.

Many a toll has been collected as such by sovereign states and political subdivisions thereof.* Franchises were granted in the old days to private corporations to construct turnpikes and to collect tolls thereon, on the theory that the state or county was delegating to the corporations or individuals the power which the sovereigns themselves could exercise.†

We submit that the so-called tax is not a tax but a toll; that many of the roads over which appellant travels were constructed under the Federal Highway Act, that the Federal Highway Act was enacted pursuant to the Constitution of the United States and that the imposition or levy in question is prohibited by the Federal Highway Act and thereby violates Section 2 of Article VI of the Constitution of the United States.

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* For other cases recognizing the power of a State or subdivision thereof to exact "tolls", see:

Carson v. *Brockton Sewerage Commission*, 182 U. S. 398, 404;
St. Louis v. *Western Union Telegraph Company*, 148 U. S. 92, 94-97;
Hamilton v. *Commonwealth*, 143 Va. 572; 130 S. E. 383, 385;
State v. *Schenkel*, 129 Mo. App. 224; 108 S. W. 635, 636-639-640;
St. Joseph Plank Road Co. v. *Kline*, 106 La. 325; 30 So. Rept. 854, 857.

† *Turnpike Co.* v. *Illinois*, 96 U. S. 63, 68;
Covington &c. Turnpike Co. v. *Sandford*, 164 U. S. 578, 587;
James H. McKee et al. v. *The Grand Rapids and Reed's Lake St. Rwy. et al.*, 41 Mich. 274; 1 N. W. 873, 876;
Gilson et al v. *Board of Com'rs of Rush County*, 128 Ind. 65; 27 N. E. 235.

POINT VII.

Whether the "Mileage Tax" be construed as "a license tax imposed upon the intrastate business of transportation for compensation on the public roads of the State" or a "toll" charged for passage over the highways, such "tax" is so arbitrary and oppressive as to amount to confiscation of appellant's property in violation of the guarantee of the Fourteenth Amendment.

The uncontradicted testimony of reputable private carriers, including that of appellant, shows that under the burden of this tax, contract carriers will not be able to perform their existing contracts and, as a consequence, will be forced to go out of business* (R. 13, 15, 17, 23, 24).

Shippers, who now find it economically to their advantage to make private contracts for the transportation of their

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* Hereunder is set forth an income statement of the appellant. His situation is no different from that of others engaged in the same business. In other words, the levy will not inflict a peculiar burden upon the appellant alone. His financial condition is no weaker than that of other carriers likewise engaged. His is merely a typical case. (See testimony of L. R. Cooper (R. 14-15); B. C. Naugle (R. 16-18); G. T. Curren (R. 22-25).)

INCOME STATEMENT

Gross Income Per Week		*Expenses.*	
To Fernandina,	$30.00	20 tires per annum, at $82.00 each	$1,640.00
Vero Beach and Ft. Pierce	60.00	7500 gal. of gasoline at 16¢ per gal.	1,200.00
Melbourne	55.00	Insurance	200.00
Titusville	50.00	Helper	1,100.00
Total per week	$195.00	Upkeep and repairs	750.00
Total for the year	$10,140.00	Oil	100.00
			$4,990.00

goods, will hardly permit the "tax" to be tacked on to the present cost of transportation, when, as a practical matter, they can purchase their own trucks, employ their own drivers, and haul their own freight, and, by so doing, relieve the cost of transportation of the additional burden in the form of this "tax".

The private business of transporting goods for compensation over the public highways is a useful and legitimate occupation, and as such is neither noxious nor detrimental to the public welfare. To legislate it out of existence without achieving any of the ostensible aims of the statute is, to say the least, palpably arbitrary. Shipper-owned trucks or trucks of other carriers will replace those of the contract carriers. Congestion on the highways will not be relieved. Wear and tear on the highways will not be lessened. And

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His taxes are as follows:

		Total Charges Per Year	
Ad valorem	$120.00		
Gasoline	450.00		
License, for truck and trailer	339.00	Expenses for operation	$4,990.00
Mileage tax under new law	*1,200.00*	Taxes	2,109.00
		Depreciation or replacement	2,000.00
Total taxes	$2,109.00	Total charges	$9,099.00

In explanation of the figures representing gross income, it should be noted that the appellant's earnings for the year are calculated on the basis that the truck and trailer go loaded to capacity on each trip, which is not, in fact, the case, as the record shows (R. 25).

With reference to the items of expense, it should be explained that the life of a set of tires is only six months, and that it requires ten tires for a full set (R. 9-10). The mileage tax under the new law is calculated on the basis of its present run (R. 18). A depreciation allowance of $2,000 is a reasonable one. The cost of his truck and trailer is $6,000 (R. 11). With normal use, they will last approximately three years (R. 11, 16).

Appellant's net earnings per year so calculated would be $1,041. This includes $360, which he might reasonably expect as a return on his capital invested elsewhere at six per cent, leaving $681 as compensation for his time and labor. And this only in the event that his truck and trailer carry capacity loads at all times, which can hardly be expected (R. 8-13).

adequacy and continuity of service can hardly be assured, when the very instrumentalities of service no longer operate. If any or all the above be the ostensible objectives of this statute, the statute falls short of providing means reasonably adapted to its ends.

The levy of this tax, if it be such, would simply result in driving this appellant, as well as all other contract carriers, out of business and force these individuals, who are now independent operators, prosecuting their own businesses, either to enter the employ of some shipper owner as a driver of an employer's trucks or to pursue some other vocation.

Whether a statute be an exercise of the police power or a taxing measure, if its effect is to deprive individuals of their business, without serving some paramount social end, it should not be sustained. This was recognized in *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111:

> "That appellant's business is a property right, *Duplex Co.* v. *Deering*, 254 U. S. 443, 465; *Truax* v. *Corrigan*, 257 U. S. 312, 327, and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear * * * and, unless justified, as a valid exercise of the police power, the Act assailed must be declared unconstitutional because the enforcement thereof will deprive appellant of its property without due process of law."

It is not as if this appellant and other private carriers do not already contribute their full share to the maintenance and upkeep of the public roads. They pay a 6¢ gasoline tax. They pay large license fees on their vehicles used for commercial purposes. They pay an *ad valorem* tax on their equipment. In short, before the passage of this statute, the business of private carriage was already heavily burdened.*

* See, Walker, Highway Tax Costs, (National Automobile Chamber of Commerce).

An additional levy which is so palpably unreasonable and confiscatory as to prevent a great number, if not all persons, from pursuing an otherwise lawful occupation should be stricken down as unconstitutional, amounting, as it does, to confiscation of property without due process of law. *Fiscal Court* v. *F. & A. Cox Co.*, 132 Ky. 738, 117 S. W. 296, 298; *Chaddock* v. *Day*, 75 Mich., 527, 42 N. W. 977; *State* v. *Allen*, 83 Fla., 214, 91 So. 104.

POINT VIII.

Chapter 13,700, Laws of Florida, 1929, impairs the obligation of appellant's contract in violation of Paragraph 1, Section 10, of Article I of the Constitution of the United States, and deprives him of his liberty to contract in contravention of the Fourteenth Amendment to the Constitution of the United States.

By the uncontradicted evidence in the Record, the imposition of the "mileage tax" will force the appellant out of business and render the performance of his contract with the Great Atlantic & Pacific Tea Company impossible (R. 13, 15, 17, 23, 24). Not only this, the statute vests in the Railroad Commission the power to deny the appellant the right to perform under his contract.

On each and both these grounds, we submit that the State of Florida has unconstitutionally impaired the obligations of appellant's contract. *Detroit United Railway* v. *Michigan*, 242 U. S. 238; *Louisiana R. & Nav. Co.* v. *Behrman*, 235 U. S. 164, 170.

As a further consideration, appellant's future liberty of contract is circumscribed. He may not, by the terms of the statute, contract in the conduct of his private business, with whom he chooses and on such terms as he may bargain. Instead, his scope of business is determined by the limits of his certificate, and application must be made afresh to the Railroad Commission to sanction any new undertaking. This, we submit, is a deprivation of his liberty without due process of law, of his "right to follow any of the common occupations of life" in violation of the Fourteenth Amendment to the Constitution. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; *Butchers' Union Slaughter Co.* v. *Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 752, 754.

CONCLUSION.

In accordance with the foregoing, it is respectfully submitted that the decision of the Supreme Court of Florida should be reversed, and the case remanded with directions that the appellant be discharged.

Respectfully submitted,

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APPENDIX A.

Florida Statute Now Before This Court for Review.

CHAPTER 13,700, LAWS OF FLORIDA, 1929.

[See Compiled Gen. Laws of Florida, Section 1335.]

AN ACT PROVIDING FOR THE SUPERVISION AND REGULATION OF PERSON, FIRMS, CORPORATIONS AND ASSOCIATIONS OWNING, CONTROLLING, OPERATING OR MANAGING MOTOR VEHICLES USED IN THE BUSINESS OF TRANSPORTING PERSONS OR PROPERTY FOR COMPENSATION OVER THE PUBLIC HIGHWAYS OF THE STATE: DEFINING AUTO TRANSPORTATION COMPANIES AND PROVIDING SUPERVISION AND REGULATION THEREOF BY THE RAILROAD COMMISSION OF THE STATE OF FLORIDA, AND PROVIDING FOR THE ENFORCEMENT OF THE PROVISIONS OF THIS ACT AND FOR THE PUNISHMENT OF VIOLATIONS THEREOF IMPOSING A MILEAGE TAX AND PROVIDING FOR THE DISPOSITION OF THE REVENUE RAISED BY THE SAME; AND REPEALING ALL ACTS INCONSISTENT WITH THE PROVISIONS OF THIS ACT.

Auto Stage and Truck Transportation Act of California which was held unconstitutional in Frost v. R. R. Commission of Cal., 271 U. S. 583.

An act providing for the supervision and regulation of the transportation of persons and property for compensation over any public highway by automobiles, jitney busses, auto trucks, stages and auto stages; defining transportation companies and providing for the supervision and regulation thereof by the railroad commission; providing for the enforcement of the provisions of this act and for the punishment of violations thereof; and repealing all acts inconsistent with the provisions of this act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF [illegible]LORIDA:

(1) Definitions:

(a) The word "Commission" means the Railroad Commission of this State.

(b) The term "corporation" when used in this Article means a corporation, a company, association, or joint stock association.

(c) The term "person" means an individual, firm or co-partnership.

(d) The word "certificate" means the Certificate of Public Convenience and Necessity authorized to be issued under the provisions of this Article.

(e) The term "public highway" means every public street, road or highway in this State.

(h) The term "auto transportation company" when used in this Article means every corporation or person, their lessees, trustees, or receivers, owning, controlling, operating or managing any

CHAPTER 213, STATUTES 1917, PAGE 330.
(Approved May 10, 1917)

Amended by Ch. 280, Stats. 1919, p. 457; Ch. 840, Stats. 1921, p. 1609; Ch. 310, Stats. 1923, p. 644; Stats. 1925, Ch. 145, p. 297; Ch. 153, p. 302; Ch. 254, p. 433.

The People of the State of California do enact as follows:

Section 1. (a) The term "corporation," when used in this act, means a corporation, a company, an association or a joint stock association.

(b) The term "person," when used in this act, means an individual, a firm or co-partnership.

(d) The term "public highway," when used in this act, means every public street or highway in this state.

(c) The term "transportation company," when used in this act, means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling,

motor-propelled vehicle not usually operated on or over rails used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route: provided, that the term "auto transportation company" as used in this Article, shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel buses from a depot to a hotel in the same town or city. Those passenger buses that operate over a definite route on regular schedules and which are regulated by the legislative body of a city, furnishing public transportation wholly within the corporate limits of any city or between cities whose boundaries adjoin, are hereby expressly excluded from the provisions of this Article.

operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county; *provided,* that the term "transportation company," as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses, sightseeing busses or busses engaged solely in the transportation of bona fide pupils attending an institution of learning when such pupils are transported solely between their homes and such institution of learning, or any other carrier which does not come within the term "transportation company" as herein defined.

(g) The words "between fixed termini or over a regular route" when used in this Article means the termini or route between or over which any auto transportation company usually or ordinarily operates any motor vehicle, even though there may be departures from said termini or route, whether such departures be periodical or irregular, whether or not any motor propelled vehicle is operated by any auto transportation company "between fixed termini or over a regular route" within the meaning of this Article, shall be a question of fact to be determined by the Commission, and the finding of the Railroad Commission thereon shall be final except as to appeal and review as hereinafter provided.

(f) The term "motor vehicle" shall include all vehicles or machines propelled by any power other than muscular used upon the public highways for the transportation of persons or property for compensation as common carriers, except motor vehicles used exclusively in transporting children to or from school, and motor vehicles used by a transportation company engaged exclusively in transporting agricultural, horticultural, dairy or other farm products from the

(e) The words "between fixed termini or over regular route," when used in this act, mean the termini or route between or over which any transportation company usually or ordinarily operates any automobile, jitney bus, auto truck, stage or auto stage, even though there may be departures from said termini or route, whether such departures be periodic or irregular. Whether or not any automobile, jitney bus, auto truck, stage or auto stage is operated by a transportation company "between fixed termini or over a regular route" within the meaning of this act shall be a question of fact and the finding of the railroad commission thereon shall be final and shall not be subject to review. [Amended, Ch. 280, Stats. 1919, p. 457; and Ch. 145, Stats. 1925, p. 297.]

Each application for a certificate of public convenience and necessity or for an order authorizing the sale, leasing, assignment or transfer of an existing operative right, privilege, franchise or permit made under the provisions of this section must be accompanied by a fee of fifty dollars; *provided, however,* the movement of products or implements of husbandry and other farm necessities from farm to farm or from and to farm to and from loading point, warehouse or other in-

point of production to the primary market, or to motor vehicles used exclusively in transporting or delivering dairy products, or by any transportation company engaged in operating taxicabs, or hotel buses to or from a depot to a hotel in the same town or city.

(i) For the purpose of this Article, all vehicles equipped to carry a load which are attached to and drawn by a motor vehicle are hereby defined as "trailers" and shall be classed as motor vehicles and subject to the provisions of this Article.

(j) The term "width of tread" means the width of the vehicle measuring from the center of tread of the outside tire to the center of tread of the opposite outside tire.

(2) Certificates to operate; suspension.

No auto transportation company shall operate any motor vehicle for the transportation of persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future public convenience and necessity requires or will require such operation, but no certificate shall be required for operation exclusively within the itial point shall not be subject to the regulations of this act. [Amended by Ch. 310, Stats. of 1923, p. 644.] (Above *proviso* declared unconstitutional Apr. 27, 1925, *Franchise Motor Freight Ass'n* v. *Railroad Commission*, 69 C. D. 473; 235 Pac. 1000.)

Sec. 2. No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any automobile, jitney bus, auto truck, stage or auto stage for the transportation of persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

Sec. 5. No transportaion company shall hereafter begin to operate any automobile, jitney bus, auto truck, stage or auto stage for the

limits of an incorporated city or town.

The Railroad Commission may at any time for a good cause suspend and upon notice to the grantee of any certificate and opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section.

(3) Application for certificate to operate; hearing; contents of certificate.

Application for such certificate of Public Convenience and Necessity shall be made by such corporation, person, firm or association, their lessees, trustees, or receivers to the Railroad Commission; such application shall be in writing verified by the appli-

transportation of persons or property, for compensation, on any public highway in this state without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any transportation company as to the fixed termini between which or the route over which it is actually operating in good faith at the time this act becomes effective, or for operations exclusively within the limits of an incorporated city, town, or city and county.

* * *

The railroad commission may at any time for a good cause suspend and upon notice to the grantee of any certificate and opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section. [Amended, Ch. 280, Stats. 1919, p. 457.]

cant and shall specify the following matters:

1. The name and address of applicant and the names and addresses of its officers, if any.

2. The public highway or highways over which, and the fixed termini or the regular route, if any, between which, or over which applicant intends to operate.

3. The kind of transportation whether passenger or freight, or both, in which applicant intends to engage, together with a brief description of each vehicle and motor power which applicant intends to use, including the seating capacity thereof, if for passenger traffic, or tonnage, if for freight traffic, and including the size and weight of such vehicles.

4. The proposed time schedule of operation.

5. The schedule or tariff showing all passenger fares or freight rates proposed to be charged between the several points or localities to be served.

6. Whether or not the said applicant is or has been operating on said routes or other routes in the State, and for what length of time and upon what time schedule of operation and upon what schedule or tariff for passenger fares or freight rates.

Upon filing of said application the Railroad Commission

shall fix a time for hearing of said application, which shall not be less than five days nor more than thirty days subsequent to the filing of said application, and no application shall be granted or a Certificate of Convenience and necessity issued without a hearing by the Railroad Commission. Notice of such hearing shall be given to the applicant and to all transportation companies serving any part of the route between the fixed termini and to the mayor or chief magistrate of each city and town in or through which the applicant desires to operate at least five full days prior to said hearing, which said notice shall recite the fact of the filing of such application, the time and the place of the hearing of the same. A copy of said notice shall be mailed at least five days prior to the time for such hearing to any transportation company holding a Certificate of Public Convenience and Necessity and operating over the route or any part of the route specified in said application. At the time specified in said notice, or at such time as may be fixed by the Commission a public hearing upon said application shall be held by the Commission. At or after such hearing the Commission may issue a Certificate of Public Con-

venience and Necessity, as prayed for or refuse to issue the same, or may issue the same with modification, or upon such terms and conditions as in its judgment the public convenience and necessity may require: Provided, that in granting application for certificate, the Commission may take into consideration the length of time the applicant has operated a scheduled motor vehicle service between the termini named in the application; the general standard of the service maintained during this period; the reliability of the applicant and his sense of responsibility toward the public as shown during the period of his operation; his court record as well as the effect that the granting of such certificate may have upon other transportation facilities within the territory sought to be served by such applicant, and also the effect upon transportation as a whole within said territory, and any other matters tending to qualify or disqualify him as a common carrier: Provided, that a Certificate of Public Convenience and Necessity shall upon hearing be granted as a matter of right to such Auto Transportation Companies operating in good faith on the 19th day of April, 1929, over the route for which such certificate shall be sought,

Any right, privilege, franchise, or permit held, owned or obtained by any transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the railroad commission. The railroad commission shall have power, with or without hearing, to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require.

who shall comply in full with the provisions of this Article.

When application is made by an Auto Transportation Company for a certificate to operate in a territory or on a line already served by a certificate holder under this Article the Commission shall grant same only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission.

Each Certificate of Convenience and Necessity issued under the provisions of this Article shall contain the following matters:

1. The name of the grantee.

2. The public highway or highways over which, and the fixed termini between which the grantee is permitted to operate.

3. The kind of transportation, whether passenger or freight, or both, in which the grantee is permitted to engage, together with a statement of the number of vehicles to be operated and the maximum seating or tonnage capacity of the vehicle or vehicles which the grantee is permitted to operate.

4. Such additional provisions and limitations as the Commission shall deem necessary or proper to be inserted in the certificate.

No certificate of Public Convenience and Necessity is-

sued under the provisions of this Article may be assigned or transferred without the consent of the Railroad Commission authorizing such transfer.

No certificate shall be issued for the operation on any highway in the State of any motor vehicles of greater width of tread than eighty-four (84) inches and greater loaded weight than eighteen thousand (18,000) pounds, for passenger or freight traffic. The Commission is hereby authorized to prescribe the maximum width of tonneau or body including load of motor vehicles used in either passenger or freight service, taking into consideration the width of road over which the same is to be operated. And the said Commission is further authorized to suspend temporarily, when the condition of the public highway requires it, the operation of motor vehicles, either for passenger or freight transportation, along and over any public highway of the State, and notice of such suspension shall be given to every holder of a certificate for operation over the said highway and to the public by publication in some newspaper or newspapers in general circulation in the territory of the route.

(4) Bonds required to be given.

The Commission shall, at the time of granting a certificate to operate any transportation company for transporting persons or property, fix and determine the amount of the bond to be given by the applicant for the protection, in case of passenger vehicle, of the passengers and baggage carried in said vehicle and of the public against injury caused by negligence of the person or corporation operating the said vehicle, and in the case of the vehicle transporting freight, for the protection of the said freight so carried and of the public against injuries received through negligence of the person or corporation operating said freight carrying vehicle; and it shall be the duty of the applicant to procure and file with the Commission the said bond for liability and property damage, including loss of baggage when same has been checked in accordance with the rules prescribed by the Commission, giving the said bond or bonds in a surety company authorized to do business in the State of Florida, or deposit, in lieu of said surety bonds, bonds of the United States Government or of any city or county in the State of Florida approved by the said Commis-

sion. The said bonds shall be conditioned to indemnify passengers and the public receiving personal injuries by any act of negligence, and for damages to property of any person other than the assured; and such bonds shall contain such conditions, provisions, and limitations as the Commission may prescribe, and said bonds shall be payable to the State of Florida, and shall be for the benefit of and subject to action thereon by any person or persons who shall have sustained an actionable injury protected thereby, notwithstanding any provisions in said bonds to the contrary, and every bond or insurance policy given shall be conclusively presumed to have been given according to and to contain all of the provisions of this Article. And no certificate shall be valid until such bond has been filed and approved and no such bond so accepted shall be cancelled by the Company issuing the same except upon ten days' notice to the Commission; and upon such notice being given by the company issuing said bond or bonds, the certificate of the person or corporation giving bond shall be revoked, unless a new bond shall be filed and accepted before the date for the cancellation of the said bond: Provided, however, that the applicant may, in the

discretion of the Commission, be allowed to file in lieu of bond an insurance policy which shall be approved by the Commission, with some casualty company or insurance company or casualty or insurance carrier authorized to do business in the State of Florida.

(5) Powers of Railroad Commission.

The Railroad Commission of the State of Florida is hereby vested with power and authority to supervise and regulate every auto transportation company in the State, to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company, to regulate the service and safety of operations of each such auto transportation company; to prescribe a uniform system and classification of accounts to be used, which among other things, shall set up adequate depreciation charges; to require the filing of annual and other reports and all other data by said auto transportation companies; and to supervise and regulate auto transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public. The Commission shall have power and authority by

Sec. 4. The railroad commission of the State of California is hereby vested with power and authority to supervise and regulate every transportation company in this state; to fix the rates, fares, charges, classifications, rules and regulations of each such transportation company; to regulate the accounts service and safety of operations of each such transportation company, to require the filing of annual and other reports and of other data by such transportation companies; and to supervise and regulate transportation companies in all others matters affecting the relationship between such companies and the traveling and shipping public. The railroad commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all transportation companies. The railroad commission, in

order to prescribe rules and regulations applicable to any and all such auto transportation companies. The Commission, in the exercise of the jurisdiction conferred upon it by this Article, shall have power and authority to make orders and prescribe rules and regulations affecting such auto transportation companies, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, or village, and in case of conflict between any such order, rule or regulation, any such ordinance or permit, the order, rule or regulation of the Commission shall in each instance prevail. No municipality shall have the right to require such auto transportation company to furnish any bond or insurance policy, or pay any license, fee or tax except as herein provided.

(6) Schedule of rates, fares, etc., to be filed with Railroad Commission.

Upon the taking effect of this Article, it shall be the duty of every such auto transportation company to forthwith file with its application for a certificate of public convenience and necessity a schedule of its rates and fares, and a time schedule of all motor vehicles operated,

the exercise of the jurisdiction conferred upon it by the constitution of this state and by this act, shall have power and authority to make orders and to prescribe rules and regulations affecting transportation companies, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, and in case of conflict between any such order, rule or regulation and any such ordinance or permit, the order, rule or regulation of the railroad commission shall in each instance prevail.

Sec. 6a. Every transportation company shall annually furnish to the commission at such time and in such form as the commission may require a report in which the transportation company shall specifically answer all questions propounded by the commission upon or concerning which the commission may desire information. The commission shall have authority to require any transportation

all of which shall be kept on file by the Commission, subject to public inspection. The Commission shall require each auto transportation company to keep open for public inspection at designated offices so much of said schedule of rates and fares and time schedules as it deems necessary for the public information.

Whenever such rates or fares or time schedules are found to be unreasonable, the Commission, upon its own motion, or upon complaint, shall upon hearing as herein provided, prescribe reasonable rates and time schedules to take the place of those found unreasonable, and such new rates shall be filed in place of the rates of schedules superseded. No rates or time schedules filed with the Commission shall be changed by any such auto transportation company without an order of the Commission sanctioning the same. It shall be unlawful for any transportation company to collect or receive a greater or less rate or charges for any service rendered by it than the transportation charge made in the schedules on file with the Commission, and no new rates shall take effect until the date named by the Commission.

company to file monthly reports of earnings and expenses, and to file periodical or special or both periodical and special reports concerning any matter about which the commission is authorized by this or any other act to enquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission. [Added, Ch. 840, Stats. 1921, p. 1609.]

(7) Violation of laws, regulations, etc.

The Commission may upon complaint, or upon its own motion, that any auto transportation company is violating the provisions of this Article or any of the rules or regulations prescribed by the Commission, or is violating any of the laws of the State, or any requirement of its certificate of Public Convenience and Necessity, issue its order to the said auto transportation company notifying it to appear before the Commission at a fixed time and place, at which time and place the Commission shall investigate the complaint made, and if it shall be satisfied after such hearing that the said auto transportation company holding a certificate has wilfully violated or refused to observe the laws of this State touching motor vehicles or any of the terms of the certificate issued to the said auto transportation company, or any of the Commission's orders, rules or regulations, the said Commission may suspend, revoke, alter, or amend any certificate issued under the provisions of this Article to the said auto transportation company; but the holder of such certificate shall have the right to appeal to the Supreme Court of the State as is now provided by law for appeals

from orders relating to railway or street railway corporations.

(8) Rules and regulations made by Commission within powers.

Every rule, regulation, decision, order or requirement made by the said Commission under the provisions of this Article shall be deemed and held to be within its jurisdiction and powers, and to be reasonable and just and such as ought to have been made in the premises, and to have been properly made and arrived at in due form of procedure, and such as can and ought to be executed, unless the contrary plainly appears on the face thereof or can be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears. All presumption shall be in favor of every action of the said Commission and all doubts as to its jurisdiction and powers shall be resolved in its favor. If, in any proceeding to enforce or to attack any rules, regulations, decisions or orders, any part thereof shall be found invalid the court shall proceed to enforce such portion thereof as may be valid if the same can be done.

(9) Practice, procedure and evidence in proceedings before Commission.

In all matters of practice and procedure, and all matters of evidence and the rules of evidence and all matters involving the effect of evidence in proceedings before the Commission under the provisions of this Article, and in proceedings by the said Commission to enforce its rates, rules, regulations, decisions, orders and requirements made hereunder, and in proceedings against the said Commission in relation to rates, rules, regulations, decisions, orders and requirements prescribed by it, all provisions of law now existing or which may from time to time be prescribed for observance in like cases arising under the law for the regulation of railroads, railroad companies and common carriers, shall govern and control.

(10) Judicial Powers of Commission.

The Commission shall, so far as the constitution of this State permits, exercise all such judicial powers as may be necessary to enable it to enforce or perform any duty, power or function conferred on it by this Article.

Sec. 7. (a) In all respects in which the railroad commission has power and authority under the constitution of this state or this act, applications and complaints may be made and filed with the railroad commission, process issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review or mandate filed with the supreme court of this state, considered and disposed of by said court, in the manner, under the conditions and subject to the limitations and with the effect specified in the public utilities act.

Sec. 7. (b) No person shall be excused from testifying or from producing any book, waybill, document, paper or account in any investigation or inquiry by or hearing before the commission or any commissioner or examiner when ordered to do so, upon the ground that the testimony or evidence, book, waybill, document, paper or account required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall, under oath have testified or

produced documentary evidence; *provided*, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained shall be construed as in any manner giving to any transportation company immunity of any kind. [Amended, Ch. 153, Stats. 1925, p. 302.]

(11) Rate of speed in operation of motor vehicles.

No Auto Transportation Company shall operate any motor vehicle on the public highways of this State at a speed in excess of the speed now permitted by the laws of this State, but motor vehicles used exclusively for carrying of passengers may be operated at any rate not exceeding forty-five (45) miles per hour.

(12) Departure from regular route in operation of motor vehicles.

An auto transportation company holding a Certificate of Public Convenience and Necessity as provided for in this Article may depart from the route described in such certificate if compelled to detour on account of the closing of roads, or for the purpose of transporting char-

tered or excursion parties to points not on such route, and not exclusively on a route seved by any other certificate holder, and may receive for such service compensation as may be agreed upon between the carrier and the party or parties so served.

(13) Every officer, agent or employee of any corporation and every other person who violates or fails to comply with, or who procures, aids, or abets in the violation of any provision of this Act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, or who fails to observe any regulation as to maximum speed of operation or maximum weight of load, of the Railroad Commission or who procures, aids, or abets any corporation or person in his failure to obey, observe or comply with any such order, maximum speed of operation, maximum weight of load, decision, rule, direction, demand, or regulation, or any part or provision thereof, is guilty of a misdemeanor and is punishable by a fine not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. [Section 7794 (2.) Compiled General Laws

Sec. 8. Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, of the railroad commission, or who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation, or any part or provision thereof, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

of Florida, 1930 Supplement.]

(14) Mileage Tax. Books and forms of account.

There shall be collected by the Comptroller of the State from every auto transportation company as herein defined to which has been granted a Certificate of Public Convenience and Necessity permitting it to engage in the transportation of passengers or freight, or both, a mileage tax of one-half cent per mile on all buses with a capacity of 10 passengers or less and a mileage tax of three-fourths cent per mile on all buses with a capacity of not more than 20 passengers nor less than 10 passengers and a mileage tax of one cent per mile on all buses of the capacity of more than 20 passengers; and a mileage tax of one cent per mile on all trucks with a loaded capacity of less than 5,500 lbs. and a tax of two cents per mile on all trucks with a loaded capacity of 5,500 lbs. or more coming within the terms of this Article, for every mile traveled by the motor vehicles of such auto transportation company over the public highways of this State. This tax shall be paid quarterly beginning October 1, 1929; Provided, that at the time of issuing said Certificate of

Public Convenience and Necessity and at the beginning of each calendar quarter thereafter the Comptroller of the State shall collect from each holder of such certificate the sum of Seventy-five Dollars, as an advance payment upon the mileage tax herein levied for the ensuing quarter which said amount shall at the end of the quarter be credited to said holder of such certificate and the difference between the said amount and the correct amount of said tax shall be adjusted by the Comptroller with the said holder of such certificate.

In order to ascertain the bus mileage of every passenger bus and the truck mileage of every freight truck traveled by the holders of certificates for such purpose the Comptroller of the State shall prescribe the books and forms of accounts to be kept by the said holder of such certificate and at the end of each current month the said holder of a certificate shall file with the Comptroller, and a duplicate thereof with the Commission, a statement verified by an officer, if the holder of such certificate is a corporation, or if the holder of such certificate is a person then by such person, showing the mileage made by said holder of such certificate during the said month: Provided, further, that the mile-

age tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, except ad valorem taxes levied upon the property of such auto transportation companies and except the gasoline tax and except the motor vehicle license tax as now provided for in section 1285; said motor vehicle license tax to be paid into the State Treasury and disposed of as provided for in Section 1304. The books and records of all auto transportation companies shall be at all times open to inspection of the Comptroller of the State and of the Commission, or any agent by them appointed for such purpose, and if the said holder of such certificate shall fail to make the monthly reports herein prescribed to the Comptroller and to the Commission, or shall fail to keep said books and records as prescribed by said Comptroller of the State, then upon notice in writing to said holder of such certificate of such default or defaults and the failure of the said holder of such certificate within five days to make said statements or to keep said records properly the certificate shall be revoked by the Commission, but the Commission shall, if requested by the said holder of such certificate, order a hearing upon the question of the

revocation of such certificate. The Comptroller of the State shall keep a true and accurate list of all auto transportation companies to whom certificates shall be issued with the post office address of each.

(15) Comptroller to keep separate account of collections.

It shall be the duty of the Comptroller of the State to keep a separate account of all moneys collected under this Article and any and all moneys so collected after deducting the necessary expenses incurred by the Comptroller of the State in carrying out the provisions of this Article shall be paid to the State Treasurer monthly. The State Treasurer shall credit the Railroad Commission fund with five per cent (5%) of the moneys so collected and paid to him to cover the expenses of the administration of this Article by the said Commission, and shall distribute the balance as follows: To each county whose highway system is used as a part of the route authorized in the Certificate of Public Convenience and Necessity issued to any auto transportation company its part of said balance in the proportion that the bus mileage traveled over its highway system bear

to the entire bus mileage traveled by the motor vehicle of said auto transportation company; such amounts shall be quarterly remitted to the County Commissioners of each of said respective counties by warrant of the Comptroller on the State Treasurer, in like manner as other payments by State warrants are made, to be paid by the said County Commissioners to the bond trustees of the county bonds, to be used by said trustees to pay the interest on and provide a sinking fund to retire the county bonds issued for the purpose of constructing the State system or the county system of good roads within said county or to be used by said county commissioners for said purpose.

(16) Permission to employ clerks and inspectors.

The Commission shall employ such necessary clerks, inspectors and employees on such terms and conditions as said Commission shall deem advisable and necessary to carry out the provisions of this Article.

(17) Operation and effect of law.

Neither this Article nor any provision hereof shall apply or be construed to apply

Sec. 9. Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this un-

to commerce with foreign nations or commerce among the several States of the union except insofar as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.

ion, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress; *provided, however,* that with reference to transportation companies operating solely in interstate commerce between any point or points within this state and any point or points in any other state or in any foreign nation, the Railroad Commission shall have the power to prescribe such reasonable, uniform and non-discriminatory rules and regulations in the interest and aid of public health, security, safety, convenience and general welfare as shall in its opinion be required by public convenience and necessity. [Amended Ch. 254, Stats. 1925, p. 433.]

(18) Effect of partial invalidity of law.

If any section, sub-section, sentence, clause or phrase of this law is for any reason held unconstitutional such decision shall not affect the validity of the remaining portions of this law. In case the provisions of this law providing for the distribution among the counties of this state of the balance of the net proceeds of all moneys collected under this Article after the five per cent (5%) thereof has been credited to

Sec. 10. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

the Railroad Commission fund, is, for any reason declared or found to be invalid, then in that event such balance of such proceeds above described shall be paid into the State Road License Fund and shall be used for the construction and maintenance of State roads under the direction of the State Road Department.

(19) Rates fixed in tariffs on file to be adhered to.

No auto transportation company shall charge, demand, collect, or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such company as specified in its tariffs filed with and approved by the Commission and in effect at the time; nor shall any such company refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person, firm, copartnership, or corporation, or other organization, or association, privileges or facilities in the transportation of persons or property except such as are regularly and uniformly extended to all; and no such company shall directly or indirectly,

Sec. 6b. No transportation company subject to the provisions of this act shall, directly or indirectly, issue, give or tender any fare, ticket, free pass, or free or reduced rate transportation for passengers or freight between points within this state, except to such person or persons as common carriers under and in accordance with the provisions of the public utilities act, are permitted to issue such fare, ticket, free passes, or free or reduced transportation and except to officers or employees of transportation companies as defined under this act. [Added Ch. 840, States 1921, p. 1609.]

issue, give, tender, or honor any free fares except to its bona fide officers, agents, employees and members of their immediate families; provided, that auto transportation companies under the Article may exchange, free transportation within the limits of this Section.

(20) Number plates.

Distinguishing number plates shall be prescribed and furnished by the Commission, which plates shall be displayed at all times upon each motor vehicle authorized for operation under this Article, for which the Commission shall charge and each auto transportation company shall pay a fee of fifty cents each. Transfers of number plates from one vehicle to another are hereby prohibited. The fees derived from the issuance of such number plates shall be paid into the State Treasury to the credit of the Railroad Commission fund.

These sections in version of Act in Florida Compiled Laws.

Section 21. All laws and parts of law in conflict with the provisions of this Act be and the same are hereby repealed.

Sec. 11. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. The provisions of an act entitled "An Act providing for the sale of

Section 22. This Act shall become effective on July 1st, 1929.

street railroad and other franchises in counties and municipalities and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts (approved March 22, 1905; Stats. 1905, p. 777) "are declared not to apply to the use of highways for the kind of transportation herein regulated.

Sec. 6. No transportation company may issue any stock or stock certificate, or any bond, or any note or other evidence of indebtedness payable at a period of more than twelve months after the date thereof unless such transportation company, in addition to the other requirements of law, shall first have secured from the Railroad Commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied and that, in the opinion of the Railroad Commission, the money, property or labor to be procured or paid for by such issue is reasonably required for the purpose or purposes specified in the order and that, except as otherwise permitted in the order in the case of bonds, notes and other evidences of indebtedness, such purpose or purposes are not, in whole or

in part, reasonably chargeable to operating expenses or to income. Such order may be made, in the discretion of the Railroad Commission, either with or without a public hearing. Except as in this section otherwise provided, the provisions of section fifty-two of the public utilities act referring to the purposes for which stocks and stock certificates, bonds, notes and other evidences of indebtedness, may be issued and the application of and the accounting for the proceeds thereof, the powers and duties of the Railroad Commission and the rights and duties of public utilities with reference thereto, the legal status of stocks and stock certificates and of bonds, notes and other evidences of indebtedness, issued without an order of the Railroad Commission then in effect, and the relationship of the State of California to such stocks and stock certificates, and such bonds, notes and other evidences of indebtedness, shall apply to and govern the issue of stocks and stock certificates, and of bonds, notes and other evidences of indebtedness, of transportation companies with the same force and effect as though section fifty-two of the public utilities act were restated in this section with the substitution of the words "transportation

company" for the words "public utility" and of the words "transportation companies" for the words "public utilities." The provisions of section fifty-seven of the public utilities act referring to fees to be charged and collected by the Railroad Commission for certificates authorizing the issue of bonds, notes or other evidences of indebtedness of public utilities shall apply to and govern authorizations by the Railroad Commission of the issue by transportation companies of bonds, notes or other evidences of indebtedness. [Amended, Ch. 280, Stats. 1919, p. 457.]

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CHARLES ELMORE CRO
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Supreme Court of the United States,

OCTOBER TERM, 1930

No. 449.

E. S. SMITH,

Appellant,

vs.

W. B. CAHOON, Sheriff of Duval County, Florida,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

REPLY BRIEF ON BEHALF OF APPELLANT.

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JOHN W. DAVIS,
CHARLES H. O'CONNOR,
Of Counsel.

THE BALLOU PRESS NEW YORK

TABLE OF CONTENTS.

PAGE

In Reply to Appellee's Contention that a Certificate of Public Convenience and Necessity, as set forth in Sections 2 and 3 of Chapter 13,700, Laws of Florida, 1929, can be Constitutionally required of this Appellant... 1

In Reply to Appellee's Contention that Chapter 13,700 Laws of Florida, 1929, as construed and applied to this Appellant does not Constitute a Denial of the Equal Protection of the Laws 8

In Reply to Appellant's Contention That the "Mileage Tax" Levied by the Statute is not a "Toll" 9

In Reply to Appellee's Contention that the "Mileage Tax" is not Confiscatory and Unreasonable 10

In Reply to the Appellee's Contention that no Showing Has Been Made that the Statute Impairs the Obligation of Appellant's Contract 12

Conclusion 14

CASES CITED.

Frost v. Railroad Commission, 271 U. S. 583 .....3, 4, 7, 12

Frost v. Railroad Commission, 70 Cal. Dec. 464, 240 Pac. 26, 31 8

Hendrick v. Maryland, 235 U. S. 610 7

Michigan Public Utilities Commission v. Duke, 266 U. S. 570 13

Terminal Taxicab Company v. Kutz, 241 U. S. 252, 255-257 5

Statutes Cited.

PAGE

California Auto, Stage and Truck Transportation Act, Sec. 7 8

Laws of Florida, 1929, Chapter 13,700, Secs. 2 and 3.... 1, 2, 3, 4, 5, 6, 7

Public Utility Act of California (Stat. 1915, p. 115) 8

Other Citations.

Journal of Land and Public Utility Economics, Vol. 1, 385 11

I. C. C. Hearing, Docket No. 23400 11

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REPLY BRIEF ON BEHALF OF APPELLANT.

To the arguments of the appellee this brief is addressed by way of reply. On the points and authorities discussed in our main brief we stand. In this reply brief we propose, by way of rebuttal only, to examine the premises on which the appellee bottoms his contentions.

IN REPLY TO APPELLEE'S CONTENTION THAT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, AS SET FORTH IN SECTIONS 2 AND 3 OF CHAPTER 13,700, LAWS OF FLORIDA, 1929, CAN BE CONSTITUTIONALLY REQUIRED OF THIS APPELLANT.

Significant are two initial propositions of the appellee.

First, the appellee joins us in the contention that "the purpose of Chapter 13,700 was to regulate the business of 'auto

transportation companies'" (Appellee's Br., p. 7). It is thus conceded, just as the Supreme Court of Florida held, that the statute is a regulation of the business of motor transportation and not a highway measure to regulate vehicle traffic on the public roads. Sections 2 and 3 of the Act, which contain the provisions relating to certificates of public convenience and necessity, by their express terms as well as by their place in legislative machinery designed to regulate the business of motor carriers, were framed to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved. Sections 2 and 3 do not purport to regulate the use of the public highways. Such provisions regulate the business of those who are engaged in using them. By such concessions, inescapable though they were, the appellee has narrowed the field of controversy.

Second, the appellee contends that a certificate of public convenience and necessity can be constitutionally required of private as well as common carriers; in other words that all of the provisions of Section 2 and 3 of Chapter 13,700 are applicable *in toto* to a contract carrier such as appellant. Such was also the State Court's ruling. But the Court below did not rule, as the appellee has erroneously stated several times in his brief, that no provisions, other than those relating to the procurement of certificates of public convenience and necessity and the payment of the mileage tax could be constitutionally applied to a private carrier. As pointed out in our main brief, (pp. 24-27), one of the chief vices of the State Court's construction of this statute is that the Court failed to indicate what provisions besides Sections 2, 3 and 14 were applicable to private carriers. What other

provisions are applicable to private carriers is a question of conjecture pure and simple.

At the outset, then, the appellee concedes that Chapter 13,700 is a regulation of the business of motor transportation, and contends that all the provisions of Sections 2 and 3 are applicable to this appellant.

The appellee rests his argument that a certificate, such as the one set forth in Sections 2 and 3, may be lawfully required of this appellant, first, on the negative proposition that the statute does not require the appellant to become a common carrier; and, second, on the proposition that the provisions of Sections 2 and 3 contain regulations appropriate to a private carrier.

The appellee lays great stress on the fact that the court below held that Chapter 13,700 did not require a private carrier to become a common carrier. In the last analysis, his argument is that so long as a statute does not require a private carrier to hold himself out to serve the public indiscriminately, that is, does not require a private carrier to become a common carrier, such a statute is constitutional.

We stoutly contend that the result and effect of requiring under Sections 2 and 3 a certificate of public convenience and necessity, of the appellant is to place him in the status of a common carrier, is to force him to assume the burdens and duties incident only to public utilities. We submit that in addition to the limitation on the power of a state to compel a private carrier to become a common carrier there are other limitations, which prohibit a state from impressing upon a private carrier regulations purely incidental to the status of a common carrier. The case of *Frost* v. *Railroad Commission*, 271 U. S. 583, is squarely in point.

In the *Frost* case, the California Statute was held to be unconstitutional, not for the reason that a private carrier would be compelled to hold himself out to serve the public indiscriminately, but because the California Statute imposed duties and obligations (similar to those in Sections 2 and 3 of the Florida Statute) upon a private carrier which were peculiar to and applicable only to common carriers. In fact, this Court pointedly said on page 592 that: "The certificate of public convenience, required by Section 5, is exacted of a common carrier and is purely incidental to that status." In the *Frost* case, the court below had not ruled that the California Statute required a private carrier to become a common carrier in the sense that he was required to hold himself out to serve the public indiscriminately. 70 Cal. Dec. 464, 240 Pac. 26, 31. It was not such a ruling that this Court reversed. The Supreme Court of California had decided that regulations and restrictions "cognate and germane to the regulation of common carriers" could be constitutionally required of private carriers as a condition precedent to the privilege of using the public roads. And the decision of this Court in the *Frost* case, which reversed the California Court on the constitutional point, is direct authority for the proposition, which we urge, namely, that the state of Florida cannot by Sections 2 and 3 impose duties, burdens and regulations "germane and cognate to the regulation of common carriers" upon this appellant, admittedly a private carrier.

The appellee, however, contends that Sections 2 and 3 embrace requirements of a private carrier *qua* private carrier which are regulations appropriate to that kind of carrier.

A review of the pertinent provisions of Sections 2 and 3 is sufficient answer to the appellee's contention. Significant, among others, are the following:

(a) In Section 2 no one may engage in the business of private carriage "without first having obtained from the Railroad Commission a certificate that the present or future *public* convenience and necessity requires or will require such operation." The existence of a private business, neither noxious nor detrimental to the public welfare, is thus made dependent solely upon the discretion of a Railroad Commission whose primary function is to supervise and regulate common carriers and other public utilities. This public utility board may "suspend, revoke, alter or amend any certificate under the provisions of this Section." In other words, power is vested in a bureaucracy to destroy, curtail or condition a business which, by hypothesis, is a strictly private enterprise, and which beyond dispute is a legitimate and useful undertaking.

(b) Under Section 3 "application for such certificate of *public* convenience and necessity shall be made * * * to the Railroad Commission." In addition to the incidental information common to ordinary licenses, such as the name, address, place of operation, kind of business engaged in, the applicant must specify "the proposed time schedule of operation * * * the schedule or *tariff showing all* passenger fares or *freight rates* proposed to be charged between the several points or localities to be served" together with a time schedule of operation and a *schedule or tariff* for passenger fares or *freight rates* which have theretofore been charged. In *Terminal Taxicab Company* v. *Kutz*, 241 U. S. 252, 255-257, this Court specifically held that a carrier whose business "consists mainly in furnishing automobiles from its central garage on orders, generally by telephone * * *

is not to be regarded as a public utility * * *" and decided that "the plaintiff is not bound to give information as to its garage rates". This information was sought by the Public Utilities Commission of the District of Columbia. This Court concluded that the Commission should be restrained from further "inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same". As a condition precedent to obtaining a certificate of public convenience and necessity, a private carrier, under section 3, must surrender a constitutional right, defined and sustained as such by this Court. Or, in other words, here is a requirement "cognate and germane" solely to common carriers which the state of Florida demands of a private carrier.

(c) Upon the filing of an application for a certificate of public convenience and necessity "notice of such hearing shall be given to the applicant and *to all transportation companies serving any part of the route between the fixed termini*". This makes manifest that the primary purpose of Sections 2 and 3 is to protect the business of competing carriers, whether such carriers operate by rail or motor, whether common or private.

(d) "At or after such hearing the Commission may issue a certificate of *public* convenience and necessity, as prayed for or refuse to issue the same with modification, or upon such terms and conditions as in its judgment the *public* convenience and necessity may require". The test is set out as the public demand for adequacy and continuity of service—a dedication of a private carrier's property to the quasi-public use of transportation.

(e) As factors to be taken into consideration in determining whether a certificate should issue the Com-

mission is directed to inquire as to "the reliability of the applicant and his sense of responsibility toward the *public* as shown during the period of his operation; * * * the *effect* that the granting of such certificate may have *upon other transportation facilities* within the territory sought to be served by such applicant, and also the *effect* upon transportation *as a whole* within said territory, and any other matters tending to qualify or disqualify him *as a common carrier*". Can there be any doubt about nature of Sections 2 and 3? Every consideration is designed to assimilate a private carrier into the status of a common carrier.

(f) To one who applies "for a certificate to operate in a territory or on a line already served by a certificate holder under this article the Commission shall grant same only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission". The Commission is thus given plenary power to control competitive conditions even to the length of prohibiting in the cause of adequacy and continuity of service to the public a private undertaking of a strictly private carrier. This is a very effective method of taking private property for public use without compensation.

To read these provisions is to see at a glance that they are not regulations of a private carrier *qua* private carrier; that they are not mere license requirements which can be met by complying with a prescribed course of conduct as in *Hendrick* v. *Maryland*, 235 U. S. 610. (It is hardly necessary to point out that these provisions are in no sense highway regulations resulting from the exercise of the power of a state to regulate the use of its highways.)

That Sections 2 and 3 are provisions "cognate and germane" to common carrier regulation is further evidenced by the fact, that the very certificate of public convenience, required by these two sections of a private carrier is also exacted of all common carriers. These provisions concerning certificate control are no whit different from the provisions of Section 5 of the California Statute and the other procedural provisions of the Public Utility Act of California (Stat. 1915, p. 115) which Section 7 of the California Auto, Stage and Truck Transportation Act adopts by reference. *Frost* v. *Railroad Commission,* 70 Cal. Dec. 464, 240 Pac. 26, 31.

On the authority, therefore, of the *Frost and Terminal Taxicab* cases we respectfully submit that the arguments on which the appellee relies to sustain the constitutionality of Sections 2 and 3 of Chapter 13,700, Laws of Florida, 1929, are unsound in the premises.

IN REPLY TO APPELLEE'S CONTENTION THAT CHAPTER 13,700, LAWS OF FLORIDA, 1929, AS CONSTRUED AND APPLIED TO THIS APPELLANT DOES NOT CONSTITUTE A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

The nub of the appellee's argument to support the exemptions in the Florida statute is found on page 31 of his brief. It is to the effect that "haulers of agricultural, horticultural, dairy, farm and fish products, from point of production to the primary markets, cannot always move on a fixed schedule on regular routes or between fixed termini", because "such movements are seasonal and temporary". But such contention entirely overlooks the initial definition of "auto transportation companies" as defined in Section 1 (h) of the Statute. If

carriers of agricultural and other raw commodities do not operate regularly between fixed termini or over a regular route, they are without the scope of the statute without need of specific exemption.

That there exist many carriers of agricultural, horticultural, dairy, farm and fish products who do operate regularly between fixed termini and on a regular route is implicit in the terms of the Statute. Otherwise, there would have been no necessity for the legislature to carve out the present exemptions. The initial definition of an auto transportation company, as pointed out above, is specific enough to exclude, without need of specific exemption, all carriers, both private and common, who do not operate between fixed termini or on a regular route.

The appellee would have us believe that the crops are seasonal in Florida, and that the movement of them is temporary. This in spite of the fact that there is but one season in Florida, the year round; this in spite of the fact some crops are being harvested, and others planted each day; and this in spite of the fact that crops are rotated year in and year out without end.

No claim of seasonal production can be made of dairy products. To exempt this large class of carriers, in and of itself, amounts to a glaring and unjust discrimination in favor of the dairying interests, resting on no reasonable ground of difference.

In Reply to Appellant's Contention That the "Mileage Tax" Levied by the Statute is not a "Toll".

The appellee attempts to characterize this levy as a license tax in the nature of a tax upon the franchise of operating

under a certificate of public convenience and necessity. To support this characterization he seeks to show that this appellant if operating under a certificate would enjoy privileges not granted to an ordinary motor vehicle operator, to wit, the permission to operate at a rate of speed in excess of the ordinary speed otherwise permitted by the laws of Florida. An examination of Section 11 shows, however, that this privilege could not be enjoyed by this appellant as it is not extended to carriers of freight but only to carriers of passengers.

The appellee argues that the "mileage tax" is in lieu of all other taxes and fees of every kind, character and description levied by the State of Florida, except *ad valorem* taxes levied upon the property of auto transportation companies; and except the gasoline tax; and except the motor vehicle license tax, and that it is, therefore, a demand of sovereignty and not a toll. The significant fact, however, despite the above language, is that the mileage tax is not in lieu of any taxes. Each and every tax levied on the appellant before this statute were saved by the exceptions in the statute.

In Reply to Appellee's Contention that the "Mileage Tax" is not Confiscatory and Unreasonable.

The appellee's claims that this levy is not confiscatory, alleging that at the present time there are many busses and trucks "now operating under the law and paying the tax" (p. 38). This is quite contrary to the recent report of the State Comptroller of Florida, wherein the total receipts of the mileage tax dating from October 1, 1929, when the payments were first made, to April 1, 1931, were only $151,721.26. The only inference to be drawn from these figures,

which include payments by all carriers operating under the statute, carriers of freight as well as passengers, carriers private as well as common, is that the vast majority of motor carriers subject to the statute has been driven out of business. The figures show that there could not have been over eighty or a hundred carriers throughout the whole of Florida operating under the statute during the past year and a half. This number is arrived at by dividing the total receipts by the amount an average truckman such as appellant would have had to pay, had he been permitted to carry out his contract with the A. & P., that is, on the basis of $1200 per year for the "mileage tax", or $1800 for the year and a half.

Throughout the appellee's brief is the intimation that motor vehicle carriers do not contribute their full share in return for facilities of public roads. That this is a popular misconception is demonstrated by Mr. Thomas H. McDonald, Chief of the U. S. Bureau of Public Roads, in a very intelligent discussion of the problem in Vol. 1 of the *Journal of Land and Public Utility Economics*, 385 "Commercial Vehicles on Free Highways"; and more recently in his testimony at the Interstate Commerce Commission Hearing on Rail-Motor Coordination under Docket 23400 at Washington, D. C., March 4th through March 17th. The result of his study and research is reflected in the following testimony:

> "In my judgment, the heavier trucks and busses by the higher tax which they are paying, and particularly through the collection of gasoline taxes, are fully meeting all excess costs of construction, due to the increased thickness that is made necessary by these heavier loads. It is a statement that will undoubtedly be contested but it will be contested largely because the effect on road

surfaces of applying loads through a much greatly increased area has never been given the consideration which it demands."

IN REPLY TO THE APPELLEE'S CONTENTION THAT NO SHOWING HAS BEEN MADE THAT THE STATUTE IMPAIRS THE OBLIGATION OF APPELLANT'S CONTRACT.

The appellee contends that this point cannot be urged by the appellant. We respectfully submit that the point is here properly presented and is raised in this Court on the record here.

In the petition for writ of habeas corpus, one of the grounds urged for the discharge of the appellant was that the statute impaired the obligation of appellant's contract (R. 3). The point was not passed on by the Supreme Court of Duval County for the reason that the Court, having held the statute unconstitutional on other grounds, did not find it necessary to consider all points raised by the appellant. Before the Supreme Court of Florida the appellant urged that the tax was unreasonable and confiscatory and argued that the imposition of the tax and certificate regulation would drive the appellant out of business. No one disputes the fact that the appellant was a private carrier engaged in the transportation of merchandise for the Great Atlantic & Pacific Tea Company under private contract at the time the statute became operative. Implicit in the argument that Chapter 13,720 would put the appellant out of business and thus prevent him from performing his contract is the contention that the statute impairs the obligations of appellant's contract.

The failure of the court below to discuss all the constitutional questions involved should not deprive us of the right

to argue this error before this Court. The impairment of the obligations of appellant's contract was assigned as error (R. 52). The Chief Justice of Florida allowed an appeal in which such error was assigned. The question we submit is properly before this Court.

In *Frost* v. *Railroad Commission, supra,* the Supreme Court of California, in upholding the constitutionality of the California statute, which was later declared unconstitutional by this Court, stated that the California Act could not be constitutionally applied to a carrier operating under contracts subsisting before and at the time of the statute's enactment. And on that ground the Court distinguished the case of *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570, saying at page 30:

> "The essential difference between that case and this rests in the fact that Duke was operating under contracts subsisting before and at the time of the enactment of the Michigan statute, which contracts remained in part unperformed. The statute afforded to him no liberty of choice. It required him to devote his property at once to public transportation and thus would have disabled him to perform his subsisting contracts. To give it effect in its application to his situation would have been to impair the obligation of those contracts... If the contracts under which petitioners herein are operating had been entered into prior to the enactment of the 1919 amendment to our statute, and had been then subsisting and unperformed, petitioners would have been in position to invoke the authority of the Duke case. But petitioners' contract was not made until 1923, and they were under no compulsion to enter into it. * * *."

Conclusion.

In accordance with the foregoing, it is respectfully submitted that the decision of the Supreme Court of Florida should be reversed, and the case remanded with directions that the appellant be discharged.

Respectfully submitted,

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John W. Davis,
Charles H. O'Connor,
Of Counsel.

APPELLEE'S BRIEF

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IN THE

Supreme Court of the United States

October Term, 1930

No. 449

E. S. SMITH,
Appellant,

vs.

W. B. CAHOON, Sheriff of Duval County, Florida,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF OF ATTORNEY GENERAL OF THE STATE OF FLORIDA FOR APPELLEE.

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TABLE OF CONTENTS

	Page
BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF FLORIDA, FOR APPELLEE	1
Reference to the Report of the Case in Lower Court	1
Statement as to Jurisdiction	1
Statement of the Case	2
Specification of Assigned Errors	3
The Particular Statute Involved and Assailed	3
Summary of Argument on Points of Law Involved	5
Argument in Detail on Points of Law	7-39
Point 1. The Statute Applies to Corporations and Persons who Use Motor Propelled Vehicles in the Business of Transporting Persons or Property for Compensation over the Public Highways of the State of Florida Between Fixed Termini or over Regular Routes, Whether such Transportation for Compensation is as Common Carriers or as Carriers for Particular Persons under Special Contract, but the Statute Does Not Require Private Carriers to Become Common Carriers	7
Point 2. The State Has Power to Require a Private Carrier to Secure a Certificate of Public Convenience and Necessity and Become Subject to Regulations Appropriate to that Kind of Carrier, in Order to Have the Privilege of Using the Highways, Even Though It May Not Compel Such Private Carrier to Become a Common Carrier in Order to Operate as a Private Carrier	10
Point 3. Although Chapter 13700 May Contain Many Provisions only Applicable to Common Carriers and Other Provisions that Perhaps Are Unconstitutional if Attempted to Be Applied to a Business like that Conducted by the Defendant, the other Provisions of the Act Regulating the Business of Defendant as an Auto Transportation Company in its Status as a Private Carrier Can Stand and Be Enforced	12

Page

Point 4. There is Nothing in Chapter 13700 Which Requires Defendant to Become a Public Carrier in Order to Secure a Permit to Use the Public Highways for Transportation in the Capacity He Now Has 14

Point 5. If the Railroad Commission Should Attempt to Apply Statutory Provisions or Rules or Regulations Inconsistent with the Constitution of the United States to the Particular Business of the Defendant, His Rights as the Holder of a Certificate of Public Convenience and Necessity Can Be Protected and Enforced by Appropriate Judicial Proceedings 15

Point 6. The Supreme Court of Florida Has Held That the Requirements of the Statute as to Procuring Certificates of Public Convenience and Necessity for Doing Business on the Highways, and as to the Tax Imposed on the Business, May Be Reasonably Applied to Private Carriers for Compensation for the Privilege of Transporting for Hire as a Business on the Public Roads of the State in the Exercise of the Police and Taxing Power of the State to Conserve the Proper Use of the Public Highways and to Serve Proper Sovereign Purposes, and that these Requirements are Severable from the other Requirements of the Statute which May Be Legally Applicable Only to Common Carriers, and Are Not Intended to Be Applied to Corporations and Persons Who Are Not Common Carriers 19

Point 7. The "Mileage Tax" Levied by the Statute Is not a "Toll" Collected for Vehicular Passage Over the Roads, but Is a License Tax Imposed Upon the Intrastate Business of Transportation for Compensation on the Public Roads of the State, and Being a License Tax Imposed Upon the Business by Statute for Public Purposes, It Does Not Violate any Provision of the Federal Highway Act Prohibiting "Tolls" 21

Page

Point 8. Chapter 13700, Acts of 1929, Does Not Deny the Appellant the Equal Protection of the Laws in Violation of the Fourteenth Amendment to the Federal Constitution. A Classification Having some Reasonable Basis Does Not Offend Against that Clause Merely Because it is not Made with Mathematical Nicety or Because in Practice it Results in some Inequality. The State Has Power to Classify in the Adoption of Police Laws, and One who Assails a Classification in such Law Must Carry the Burden of Showing That It Does Not Rest Upon any Reasonable Basis but Is Essentially Arbitrary 24

Point 9. The Tax Is Not Confiscatory nor Unreasonable in a Constitutional Sense, Nor Is There Any Basis for This Court to so Declare on the Record Here Presented 36

Point 10. No Showing Has Been Made that the Statute Violates Section 10 of Article I of the Constitution of the United States or That it Impairs the Obligation of Contracts Held by the Appellant 39

Conclusion 40

Appendix 41

CITATIONS

FLORIDA CASES

Page

Amos vs. Gunn, 84 Fla. 285, 94 So. 615 37
Cahoon vs. Smith, 128 So. 632, 99 Fla. 1174 1-9
Hiers vs. Mitchell, 95 Fla. 345, 116 So. 81 23-28
Noble vs. Carlton (Fla. Milk Law) Decided Jan. 3, 1930, 36 Fed. (2d) 967 30
Osborne vs. Florida, 164 U. S. 650, 41 L. Ed. 586..... 12
Peninsular Casualty Co. vs. State, 68 Fla. 411 37
Pullman Co. vs. Knott, 70 Fla. 9, 69 So. 703, 243 U. S. 447 37
Rast vs. Van Deman & Lewis Co. (Fla.), 240 U. S. 342, L. R. A., 1917-A, 421, Florida case 25
State vs. Allen, 83 Fla. 219, 91 So. 104 37

OTHER CASES

A. C. L. R. R. Co. vs. Goldsboro, 232 U. S. 548 (558) 39
Alaska Fish Co. vs. Smith, 255 U. S., Text 48-49 36
Aluminum Co. vs. Ramsey, 222 U. S. 251, 32 Sup. Ct. 76, 56 L. Ed. 185 33
Amr. Sugar Refining Co. vs. Louisiana, 179 U. S. 89.... 27
Assaria State Bank vs. Dolley, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123 35
Board of Education vs. Illinois, 203 U. S. 553, 27 Sup. Ct. 171, 51 L. Ed. 314; 8 Anno. Cases, 157 33
Bosley vs. McLaughlin, 236 U. S. 385, 35 Sup. Ct. 345, 59 L. Ed. 632 34
Cargill Co. vs. Mill., 180 U. S. 452, 45 L. Ed. 619..... 15
Carley and Hamilton vs. Snook, 281 U. S. 6, 74 L. Ed. 704 22
C. B. & Q. R. R. Co. vs. McQuite, 219 U. S. 549 (567) 39
Central Lbr. Co. vs. Sou. Dakota, 226 U. S. 157..... 27
Chicago Dock & Canal Co. vs. Fraley, 228 U. S. 680.... 25
Citizens Tel. Co. vs. Fuller, 229 U. S. 322, 33 Sup. Ct. 833, 57 L. Ed. 1206 34

Page

Clark vs. Poor, 274 U. S. 554, 71 L. Ed. 1199 17
C. N. O. & T. P. R. R. vs. Kentucky, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414 33
Consolidated Coal Co. vs. Illinois, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872 33
Dominion Hotel Co. vs. Arizona, 246 U. S. 265 26-31
Dordy vs. Kansas, 272 U. S. 306, 71 L. Ed. 248 12
Engel vs. O'Mally, 219 U. S. 126 27-30
Erb vs. Morasch, 177 U. S. 586, 20 Sup. Ct. 819, 44 L. Ed. 897 35
Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112, 41 L. Ed. 369 12
Finley vs. Calif., 222 U. S. 28 27
Frick vs. Webb, 263 U. S. 326, 44 Sup. Ct. 115, 68 L. Ed. 323 33
Frost vs. R. R. Com., 271 U. S. 583, 70 L. Ed. 1101, 10-13-18
Griffith vs. Connecticut, 218 U. S. 563, 31 Sup. Ct. 17, 54 L. Ed. 1151 33
Health & Milligan Co. vs. Worth, 207 U. S. 355 25
Hendrick vs. Maryland, 235 U. S. 610, 59 L. Ed. 385 18
Hudson Co. Water Co. vs. McCarter, 209 U. S. 349 (357) 30
Interstate Bus Corp. vs. Blodgett, 276 U. S. 245, 72 L. Ed. 551 17
Jackson vs. Fuller, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215 34
Jeffry Mfg. Co. vs. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364 34
Keokee Coke Co. vs. Taylor, 234 U. S. 244 (227) 26
Knox vs. Lee, 12th Wall. 457 (550-551) 39
Lindley vs. Natural Carbonic Gas Co., 220 U. S. 61 28
M. & St. L. Ry. Co. vs. Beckwith, 129 U. S. 1, 9 Sup. Ct. 207, 32 L. Ed. 585 33
Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 294, 18 Sup. Ct. 599, 42 L. Ed. 1043 33

Page

Marcus Brown Holding Co. vs. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877 35

Merrimac, The, 242 Fed. 572 35

Michigan Public Utilities Com. vs. Duke, 266 U. S. 570, 69 L. Ed. 445 14-18

Middleton vs. Texas Power & Light Co., 249 U. S. 152, 39 Sup. Ct. 227, 63 L. Ed. 527 25-26-35

Montclair vs. Ramsdale, 107 U. S. 147 21

M. P. Ry. Co. vs. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107 32

McLean vs. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315 33

New York Central R. R. vs. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917-D 1..... 34

Packard vs. Banton, 264 U. S. 140, 68 L. Ed. 596 8

Patsome vs. Pennsylvania, 232 U. S. 144 26

People ex rel. Brooklyn City R. R. Co. vs. State Board of Com'rs, 199 U. S. 48, 25 Sup. Ct. 713, 50 L. Ed. 79 34

People ex rel. Metropolitan Street Ry. Co. vs. State Board of Tax Com'rs, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Anno. Cases 381 34

People ex rel. Twenty-third Street Ry. Co. vs. State Board of Tax Com'rs, 199 U. S. 53, 25 Sup. Ct. 715, 50 L. Ed. 85 34

People vs. Roberts, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. Ed. 323 34

Porterfield vs. Webb, 263 U. S. 225, 44 Sup. Ct. 21, 68 L. Ed. 278 33

Postal Tel.-Cable Co. vs. Taylor, 192 U. S. 64, 72 36

Powell vs. Pennsylvania, 127 U. S. 678 (685) 27

Producers Trans. Co. vs. R. R. Com., 251 U. S. 228 (232) 39

Rast vs. Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917-A, 421 (Fla. Case) 25-35

Page

Raymann Brewing Co. vs. Brister, 179 U. S. 445 27
Rosenthal vs. New York, 226 U. S. 260 25
Southern Motorways, Inc., vs. Perry, 39 Fed. 2nd) 145 11
Sprout vs. City of South Bend, 277 U. S. 163, 72 L. Ed. 833 17
State vs. LeFebvre, 219 N. W. 167 32
S. W. Oil Co. vs. Texas, 217 U. S. 114 26
Tullis vs. Lake Erie & Western, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192 33
Union Drygoods Co. vs. Ga. Pub. Service Com., 248 U. S. 372 39
Waters-Pierce Oil. Co. vs. Texas, 177 U. S. 28, 44 L. Ed. 657 12
Webb vs. O'Brien, 263 U. S. 313, 44 Sup. Ct. 112, 68 L. Ed. 318 33
Williams vs. Riley, 280 U. S. 78, 74 L. Ed. 175 22
Williams vs. Peyton, 4 Wheat. 77, 4 L. Ed. 518 12
Winchester vs. Winchester Waterworks Co., 251 U. S. 192, 64 L. Ed. 221 12
W. U. Tel. Co. vs. Decatur, 81 So. 199 38

OTHER CITATIONS

Annotated Cases, 1917-B 455 35
Annotated Cases, 1917-D 629 34
Chap. 13700, Laws of Fla., Acts 1929.....4, 5, 6, 7, 8, 29
Chap. 13700, Sec. 14 .....22, 24, 25
Chap. 69, 40 Stat. at Large, 1189-1200 21
Chap. 119, 42 Stat. at Large, 212 21
Chap. 241, 39 Stat. at Large, 355, as amended..... 21
Compiled General Laws of Fla., Sec. 1280 29
Compiled Statutes 7477 bb 21
Compiled Statutes, 7477¼ a 21
Federal Highway Act, Nov. 9, 1921 21
Florida Act, 1913 35

IN THE

Supreme Court of the United States

October Term, 1930

No. 449

E. S. SMITH,
Appellant,
vs.
W. B. CAHOON, Sheriff of Duval County, Florida,
Appellee.

Appeal from the Supreme Court of the State of Florida.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF FLORIDA FOR APPELLEE.

REFERENCE TO THE REPORT OF THE CASE IN THE COURT BELOW.

The opinion of the court below was filed May 21st, 1930, and is cited as Cahoon, Sheriff, vs. Smith, 128 So. 632, 99 Fla. 1174.

The judgment was entered May 21st, 1930, and will be found on page 48, Printed Record.

STATEMENT AS TO JURISDICTION

On the 7th day of October, 1930, the appellant filed and served upon opposing counsel their statement on the jurisdiction of the court conformable to paragraph 1 of rule 12 of the revised rules of practice of this court.

On the 24th day of November, the Court announced its finding that probable jurisdiction had been shown under Sections 861 (a), 861 (b), of Title 28, United States Code, as amended April 26, 1928, and under Rule 46, United States Supreme Court, effective July 1st, 1928, Section 237 of the Judicial Code as amended by Act of February 13, 1925, Section 344, Title 28, United States Code.

STATEMENT OF THE CASE

This is an appeal from a final judgment rendered by the Supreme Court of the State of Florida in a habeas corpus proceeding, under which the Supreme Court of Florida upon a writ of error to the Circuit Court of Duval County, Florida, reversed a judgment ordering the discharge of the petitioner in habeas corpus proceedings brought by him on the ground that Chapter 13700, Acts of 1929, Laws of Florida, under which petitioner was being prosecuted, was unconstitutional as violative of certain provisions of the statutes and Constitution of the United States.

From the record in the Supreme Court it appeared that E. S. Smith owned and operated two motor propelled vehicles in the business of transporting property for compensation upon the public highways of the State between fixed termini and over regular routes, all within the State of Florida, not as a common carrier but as a carrier under special contract for a single shipper; that he had not made application for nor received a certificate of public convenience and necessity and had not paid to the Comptroller of the State of Florida an advance payment upon the mileage tax required by Chapter 13700, Laws of Florida, 1929, and that such failure being a misdemeanor under the statute, the said E. S. Smith had been committed to the custody of the appellee, W. B. Cahoon, as sheriff of Duval County, Florida, for trial.

Not being satisfied with his commitment Smith applied to a circuit judge for a writ of habeas corpus upon the ground that Chapter 13700, Acts of 1929, could not be constitutionally applied to the facts of his particular case, and upon hearing the circuit judge discharged the petitioner. The holding was that the Florida statute violated the Fourteenth Amendment to the Constitution of the United States, insofar as the same related to private carriers for compensation. (Record, pages 31-35.)

This holding of the circuit judge was under the Florida practice taken by writ of error to the Supreme Court of

Florida for review, and that Court reversed the holding of the circuit judge and issued its mandate that Smith should be held for trial on the charge made against him. (Record, page 48.)

The opinion of the Florida Supreme Court will be found in the Printed Transcript of the Record, pages 43 to 48, and its effect is to hold that the Florida statute as construed and applied by the Supreme Court of Florida to a business like that in which appellant was admittedly engaged is not violative of any provision of the Federal statutes and is not violative of any provision of the Federal Constitution.

SPECIFICATION OF ASSIGNED ERRORS

The object of this appeal is to have this Court declare the Florida statute unconstitutional on the following grounds embraced in the appellant's fourteen assignments of error: (Record, pages 50-53.)

1. That the statute denies the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

2. That the statute is repugnant to paragraph 2 of Article VI of the Constitution of the United States, and that it imposes a toll for the use of Federal Aid highways in violation of Section 9, Chapter 1, of the Federal Highway Act.

3. That the statute violates the Fourteenth Amendment to the Constitution of the United States in that it deprives appellant of his property without due process of law.

4. That the statute violates Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of contracts held by the appellant.

THE PARTICULAR STATUTE INVOLVED AND ASSAILED

The entire statute under attack is printed in an appendix to this brief. (Pages 41-58.)

The Act was passed at the 1929 Session of the Florida

Legislature and became Chapter 13700, Laws of Florida. Its pertinent provisions may be summarized as follows:

Section 1 defines the various technical terms used in the Act, and Section 2 prohibits the operation of motor vehicles by auto transportation companies except in compliance with the terms and conditions of the Act, as thereafter set forth.

Section 3 provides for applications by auto transportation companies for certificates of public convenience and necessity, and prescribes the form of such certificates when issued, as well as certain limitations governing the issuance thereof.

Section 4 requires the giving of bond by auto transportation companies for the protection of the public, after they are licensed under the Act.

Sections 5, 6, 7, 8, 9, and 10 confer certain jurisdiction and powers upon the Railroad Commission with reference to the regulation of auto transportation companies under the Act, and defines the character, scope, extent and limitations for the exercise of such powers.

Sections 11 and 12 impose certain duties and requirements upon auto transportation companies subject to the Act.

Section 13 prescribes penalties for violation of the Act.

Sections 14 and 15 fix the mileage tax and other taxes to be paid by companies subject to the provisions of the Act, while the remaining Sections 16, 17, 18, 19 and 20 lay down certain details of administration leading to the execution of the Act by the Railroad Commission and the Comptroller, and the disposition of revenue derived under it.

The Act became effective July 1st, 1929, and the first payment of mileage tax was required to be made October 1st, 1929.

ARGUMENT

Summary of the Argument

POINT 1. The statute applies to corporations and persons who use motor propelled vehicles in the business of transporting persons or property for compensation over the public highways of the State of Florida between fixed termini or over regular routes, whether such transportation for compensation is as common carriers or as carriers for particular persons under special contract, but the statute does not require private carriers to become common carriers.

POINT 2. The State has power to require a private carrier to secure a certificate of public convenience and necessity and become subject to regulations appropriate to that kind of carrier, in order to have the privilege of using the highways, even though it may not compel such private carrier to become a common carrier in order to operate as a private carrier.

POINT 3. Although Chapter 13700 may contain many provisions only applicable to common carriers and other provisions that perhaps are unconstitutional if attempted to be applied to a business like that conducted by the defendant, the other provisions of the Act regulating the business of defendant as an auto transportation company in its status as a private carrier can stand and be enforced.

POINT 4. There is nothing in Chapter 13700 which requires defendant to become a public carrier in order to secure a permit to use the public highways for transportation in the capacity he now has.

POINT 5. If the Railroad Commission should attempt to apply statutory provisions or rules or regulations inconsistent with the Constitution of the United States to the particular business of the defendant, his rights as the holder of a certificate of public convenience and necessity can be protected and enforced by appropriate judicial proceedings.

POINT 6. The Supreme Court of Florida has held that the requirements of the statute as to procuring certificates of public convenience and necessity for doing business on the highways, and as to the tax imposed on the business, may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State in the exercise of the police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes, and that these requirements are severable from the other requirements of the statute which may be legally applicable only to common carriers, and are not intended to be applied to corporations and persons who are not common carriers.

POINT 7. The "mileage tax" levied by the statute is not a "toll" collected for vehicular passage over the roads, but is a license tax imposed upon the intrastate business of transportation for compensation on the public roads of the State, and being a license tax imposed upon the business by statute for public purposes, it does not violate *any* provision of the Federal Highway Act prohibiting "tolls."

POINT 8. Chapter 13700, Acts of 1929, does not deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in inequality. The State has power to classify in the adoption of police laws, and one who assails a classification in such law must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary.

POINT 9. The tax is not confiscatory nor unreasonable in a constitutional sense, nor is there any basis for the Court to so declare on the record here presented.

POINT 10. No showing has been made that the statute violates Section 10 of Article I of the Constitution of the United States or that it impairs the obligation of contracts held by the appellant.

ARGUMENT

POINT 1.

THE STATUTE APPLIES TO CORPORATIONS AND PERSONS WHO USE MOTOR PROPELLED VEHICLES IN THE BUSINESS OF TRANSPORTING PERSONS OR PROPERTY FOR COMPENSATION OVER THE PUBLIC HIGHWAYS OF THE STATE OF FLORIDA BETWEEN FIXED TERMINI OR OVER REGULAR ROUTES, WHETHER SUCH TRANSPORTATION FOR COMPENSATION IS AS COMMON CARRIERS OR AS CARRIERS FOR PARTICULAR PERSONS UNDER SPECIAL CONTRACT, BUT THE STATUTE DOES NOT REQUIRE PRIVATE CARRIERS TO BECOME COMMON CARRIERS.

It was the contention of the State in the Court below that the purpose of Chapter 13700 was to regulate the business of "auto transportation companies," whether common carriers or private carriers, so long as they operated motor vehicles for the purpose of transporting freight and passengers for hire between fixed termini or over regular routes along the highways of the State of Florida.

It was further contended by the State that as an incident to the purpose of the Act "to regulate the business of transporting persons or property for compensation over the public highways of the State" that the Act defined the term "auto transportation company" and included in that definition not only common carriers, but every kind of carrier, contract carrier or private carrier, who operated over the public highways between fixed termini or over regular routes.

The Court looks to the essential character of what is done, and if it appears that the essential character of the

business being transacted is that of an auto transportation company, although confined by contract to one particular shipper, who has enough business to supply the entire patronage requirement of the auto transportation company, the existence of such special contract does not destroy the essential character of the service being rendered, nor does it take such service out of the terms and purview of the statute which was designed to regulate not only the conduct of the business itself, but of the use of the roads employed in conducting it, and to impose a reasonable tax upon persons engaged in business of that character requiring the use of the roads.

The right of the State to regulate traffic over the highways by persons engaged in hauling persons and property for hire is not limited to the regulation of such business when done by common carriers, but extends to the so-called private carriers as well. This is clearly indicated by the opinion of this Court in the case of Packard vs. Banton, 264 U. S. 140, 68 L. Ed. 596, where the Court said:

> "The use of streets for gain is special and extraordinary, and generally may be prohibited and conditioned, as the Legislature deems proper."

The Florida Legislature in enacting Chapter 13700 had power to extend its regulation and tax over all vehicles for hire, when operated between fixed termini and over regular routes, whether common carriers or not, and the Supreme Court of Florida in its opinion definitely construed the statute as applying to corporations and persons who use motor propelled vehicles in the business of transporting persons or property for compensation over the public highways of the State of Florida between fixed termini or over regular routes, whether such transportation for compensation is as common carriers or as carriers for particular persons under special contract. (Record, page 45.)

But the Florida Supreme Court distinctly held that not all of the provisions of Chapter 13700 could be applied

to carriers under special contract as distinguished from common carriers.

In this connection the Court held that the statute should not be construed as being intended to require private carriers to become common carriers, and that therefore those provisions of the statute that are legally applicable only to common carriers should be held as not intended to be enforceable against and not applicable to corporations or persons who are not common carriers, though engaged in the transportation covered in general by the statute. And that inasmuch as the provisions of the statute that are legally applicable to private carriers for compensation were capable of being effectuated by themselves, leaving the other provisions that were legally applicable only to common carriers to be applied to such common carriers as are covered by the statute and not otherwise, that the statute so construed did not violate the Constitution and laws of the United States. (Transcript of record, 45-46.)

Turning its attention to the provisions of the statute which the Florida Supreme Court said could be applied to private carriers, as well as common carriers, the Court said:

> "The requirements as to procuring certificates of public convenience and necessity for doing the business on the highways, and as to the tax imposed on the business, may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State, in the exercise of the police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes." (Record, page 46.)
>
> Cahoon vs. Smith, 128 So. 632, 99 Fla. 1174.

It will thus be seen that the Florida Supreme Court did not hold that all of the provisions of Chapter 13700, Acts of 1929, could be applied to private carriers but that only those particular provisions of the statute which required

the procurement of a certificate of public convenience and necessity and the payment of a mileage tax could be so applied, together with the incidental police regulations flowing from the grant of certificate under the Act.

In other words, the holding of the Supreme Court of Florida is limited to the proposition that the State had power to require carriers under special contract, who were not common carriers, to secure a certificate of public convenience and necessity, and become subject to regulations appropriate to that kind of carrier, and to pay a special mileage tax as provided by law in order to have the privilege of using the highways for the conduct of a private business for compensation.

POINT 2.

THE STATE HAS POWER TO REQUIRE A PRIVATE CARRIER TO SECURE A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND BECOME SUBJECT TO REGULATIONS APPROPRIATE TO THAT KIND OF CARRIER, IN ORDER TO HAVE THE PRIVILEGE OF USING THE HIGHWAYS, EVEN THOUGH IT MAY NOT COMPEL SUCH PRIVATE CARRIER TO BECOME A COMMON CARRIER IN ORDER TO OPERATE AS A PRIVATE CARRIER.

The constitutional power of a State to do this was distinctly recognized in the very case upon which the appellant most strongly relies for reversal of the judgment of the Court below.

Frost vs. Railroad Commission, 47 L. R. A. 457, 271 U. S. 583, 70 L. Ed. 1101.

In that case this Court distinctly said:

> "In other words, the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier, but is that of

a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier, and of being regulated as such by the Railroad Commission. A certificate of public convenience required by Section 5 is exacted of a common carrier, and is purely incidental to that status. The requirement does not apply to a private carrier qua private carrier, but to him only in his imposed statutory character of common carrier. Apart from that signification, as far as he is concerned, it does not exist."

Thus we have an express recognition by this Court that a State statute undertaking to regulate a private carrier **in his status as a private carrier,** by requiring him to secure a certificate of public convenience and necessity and become subject to certain regulations appropriate to that kind of carrier, in order to use the highways as a means of conducting a business for profit, is entirely valid, provided it does not compel such private carrier to assume the burden of devoting its property to public use by engaging in the business of a common carrier in order to secure the benefits of the right to operate as a contract carrier only.

A state statute undertaking to make a regulation of this kind is sustainable as being within the police power under the authority of the State to regulate:

(1) The business done, because the nature of the business is such as to be peculiarly subject to the police power, and

(2) The use of the public highways owned by the State as a medium for the conduct of that business, because the highways are the property of the State and under its control and supervision.

Southern Motorways, Inc., vs. Perry, 39 Fed. (2nd) 145.

POINT 3.

ALTHOUGH CHAPTER 13700 MAY CONTAIN MANY PROVISIONS ONLY APPLICABLE TO COMMON CARRIERS AND OTHER PROVISIONS THAT PERHAPS ARE UNCONSTITUTIONAL IF ATTEMPTED TO BE APPLIED TO A BUSINESS LIKE THAT CONDUCTED BY THE DEFENDANT, THE OTHER PROVISIONS OF THE ACT REGULATING THE BUSINESS OF DEFENDANT AS AN AUTO TRANSPORTATION COMPANY IN ITS STATUS AS A PRIVATE CARRIER CAN STAND AND BE ENFORCED.

As we have pointed out heretofore, the Supreme Court of Florida has directly and in terms held that the several sections of the Florida statute are severable, and that the statute should not be construed as being intended to cause contract carriers to submit to those regulations provided in the statute which are appropriate only to common carriers.

This construction of the state statute by the Florida Supreme Court which is the highest court in the State is binding on this Court and the constitutionality of the statute here must be tested in the light of how it has been construed and applied by the Florida Supreme Court, and not according to the construction or application contended for by the appellant.

Osborne vs. Florida, 164 U. S. 650; 41 L. Ed. 586;

Fallbrook Irrigation District vs. Bradley, 164 U. S. 112, 41 L. Ed. 369;

Williams vs. Peyton, 4 Wheat. 77, 4 L. Ed. 518;

Dordy vs. Kansas, 272 U. S. 306, 71 L. Ed. 248;

Waters-Pierce Oil Co. vs. Texas, 177 U. S. 28, 44 L. Ed. 657;

Winchester vs. Winchester Waterworks Co., 251 U. S. 192, 64 L. Ed. 221.

The Court of original jurisdiction (the circuit judge hearing the habeas corpus application), seemed to think that the statute violated the holding of this Court in the **Frost case, 271 U. S. 583, 70 L. Ed. 1101, 47 L. R. A. 457.** (See Record, page 32.)

In that case, however, the main holding of this Court was that a private carrier was unconstitutionally deprived of his property without due process of law, **only** in the event that the State required him to become a public carrier in order to secure a permit to use the public highways for transportation purposes.

This is the principal authority relied on by the appellant in this case to reverse the judgment of the Supreme Court of Florida, and in fact is the sole basis for the appellant's contention that the statute violates that provision of the Federal Constitution which denies to the States the right to deprive any person of his property without due process of law.

In the **Frost case** this Court pointed out that in its opinion the Supreme Court of California had construed the statute under consideration as requiring Frost to become a common carrier if he wished to engage in the business of a private carrier, which requirement the Supreme Court of California had undertaken to justify on the ground that because the State had the power to prohibit the business of Frost entirely, it had the power to make him accept the burden of being a common carrier if he wished to transact his business over the highways as a private carrier.

It will therefore be noted that the sole question passed upon by this Court in the **Frost case** was the constitutional question whether or not the statute of California **as construed** violated the due process clause of the Federal Constitution.

This Court held against the statute, it is true, but it pointed out in its opinion that it so held **only because of the particular construction placed upon the statute by the Supreme Court of California.**

It also pointed out in its opinion that it so held, because the case presented was not that of a private carrier who, in order to have the privilege of using the highways, was required merely to secure a certificate of public convenience and necessity and become subject to regulations appropriate to that kind of a carrier only, but was that of a private carrier who, in order to enjoy the use of the highways, would have to submit to the condition of becoming a common carrier and of being regulated as such by the Railroad Commission of California.

In another case relied upon by the appellants, **Michigan Public Utilities Company vs. Duke, 266 U. S. 570, 69 L. Ed. 445**, the statute involved declared all persons using the highways for hire to be common carriers and thereby created all users of the highways for hire common carriers by legislative fiat.

No such case is presented here because the Florida statute contains no provision similar to that dealt with in the foregoing case either in terms or in effect.

Nor has the Supreme Court of Florida so interpreted or applied the statute as to lead to the same unconstitutional result that was complained of in that case.

POINT 4.

THERE IS NOTHING IN CHAPTER 13700 WHICH REQUIRES DEFENDANT TO BECOME A PUBLIC CARRIER IN ORDER TO SECURE A PERMIT TO USE THE PUBLIC HIGHWAYS FOR TRANSPORTATION IN THE CAPACITY HE NOW HAS.

In order to sustain the foregoing proposition made by us, it is only necessary to refer to the opinion of the Florida Supreme Court in the case at bar.

That opinion as we have pointed out distinctly negatives the idea that the Florida statute is intended to be applied or can be legally so applied as to compel private carriers securing a certificate of public convenience and necessity from the Florida Railroad Commission to there-

by assume and abide by the regulations of the Commission which are applicable only to common carriers.

On the contrary the Florida Supreme Court recognizes that only those provisions of the Florida statute relating to the procurement of certificates of public convenience and necessity by all carriers for hire between fixed termini and over regular routes, and requiring the payment of a mileage tax for the privilege of using the highways, and those provisions of the statutes which relate to the size, weight and speed of vehicles on the highways and the like, can be applied to private carriers.

We have already pointed out that under the repeated rulings of this Court such a construction of the Florida statute by its own Supreme Court must be accepted here.

POINT 5.

IF THE RAILROAD COMMISSION SHOULD ATTEMPT TO APPLY STATUTORY PROVISIONS OR RULES OR REGULATIONS INCONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES TO THE PARTICULAR BUSINESS OF THE DEFENDANT, HIS RIGHTS AS THE HOLDER OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY CAN BE PROTECTED AND ENFORCED BY APPROPRIATE JUDICIAL PROCEEDINGS.

The foregoing proposition is clearly sustained by the holding of this Court in the case of Cargill Company vs. Minn., 180 U. S. 452, 45 L. Ed. 619, which seems to fully meet and obviate all Federal constitutional objections which might otherwise be successfully contended for by appellant in regard to Chapter 13700, even had the Supreme Court of Florida not construed the Statute as we have pointed out before.

In that case the contention was made that an Act of the State of Minnesota (similar in effect to the Act involved here) regarding grain elevators, was unconstitutional because it required all such elevators to procure a

license to operate and then imposed the duty on all elevators which were licensed under the statute to be common carriers, so to speak.

This Court refused to declare the Minnesota statute unconstitutional because of this and said:

> "That although the statute might contain many provisions unapplicable to warehouses like the one owned by the defendant, and other provisions that, perhaps, were unconstitutional when applied to a business like that in which the company was engaged, the provision requiring a license could stand and be enforced."

See 180 U. S. Text 466.

In another place in the same opinion the Court says (180 U. S. Text 468):

> "If the Commission refuse to grant a license, or if it seeks to revoke one granted, because the applicant in the one case, or the licensee in the other, refuses to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

We may concede that undoubtedly Chapter 13700 contains many provisions which are peculiarly appropriate to common carriers; that it possibly also contains provisions which are appropriate **only** to common carriers, and therefore cannot be applied to so-called private or contract carriers like the appellant pretends to be.

But these provisions are **separable**, and the record in this case does not show that the defendant in error is being required to comply with any regulation which would make him a common carrier, or with any term of the statute whatsoever other than to procure a certificate of public convenience and necessity, and to pay the tax

imposed upon him by law, neither of which is a regulation exclusively applicable to a common carrier under the Federal Constitution, nor solely appropriate to such carrier.

Clark vs. Poor, 274 U. S. 554, 71 L. Ed. 1199.

As we have pointed out, this Court has held that the State has the right to require even a so-called "private" carrier to take out a certificate of public convenience and necessity appropriate to that kind of carrier, and to observe rules and regulations applicable to him in his status as a "private" carrier.

This Court has also held that the State has the undoubted right to impose a mileage tax on persons using the public highways of the State upon which to conduct a gainful occupation in the carriage of goods.

Interstate Bus Corporation vs. Blodgett, 276 U. S. 245, 72 L. Ed. 551.

Sprout vs. City of South Bend, 277 U. S. 163, 72 L. Ed. 833.

The only prohibition on the State in this regard is that the State shall not require the so-called "private" carrier to become a common carrier, in order to enjoy his rights as a "private" carrier.

No case is presented by this record which shows that a private carrier is being compelled by a State statute to become a common carrier against his will. The only case presented here is a showing that the appellant Smith has failed to comply with a statute of the State of Florida which, properly construed, applies to him at least in part, and that therefore he has committed a violation of the criminal laws of Florida for which he was arrested.

Regardless of what else may be done to the appellant under Chapter 13700, the appellant can at least be compelled by the State of Florida to take out a certificate of public convenience and necessity, and to pay the mileage tax fixed by Chapter 13700, even in his status as an exclusively "private" carrier. There is, therefore, no

ground to complain of the constitutionality of the statute insofar as these two particulars are concerned.

Hendrick vs. Maryland, 235 U. S. 610, 59 L. Ed. 385.

The form of certificate of public convenience and necessity itself, fixed by Section 6 of the Act, contains nothing which indicates that by accepting such certificate a private carrier must become a common carrier, and consequently the appellant's contentions built up around the **Frost case** and the **Duke case** are obviously untenable.

Further, the **Cargill case**, supra, is a sufficient answer to all the contentions made by the appellant with regard to other provisions of the Act for the violation of which he is not now being prosecuted.

Upon the principles announced in that case the Supreme Court of Florida has sustained certain portions of Chapter 13700 as being constitutionally applicable to the appellant to the extent that he may be required to take out a certificate of public convenience and necessity and pay the mileage tax provided for by the Act, even though it be conceded for the sake of argument that other provisions of the Act if attempted to be applied to the particular business of the appellant could not be constitutionally so applied, so long as he maintains his status as an exclusively "private" or "contract" carrier.

So the appellant has in no wise in this case brought himself within the holdings of this Court in either of the two cases he relies on:

Frost vs. Railroad Commission, 70 L. Ed. 1101, 271 U. S. 583;

Michigan Public Utilities Commission vs. Duke, 69 L. Ed. 445, 266 U. S. 570.

POINT 6.

THE SUPREME COURT OF FLORIDA HAS HELD THAT THE REQUIREMENTS OF THE STATUTE AS TO PROCURING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR DOING BUSINESS ON THE HIGHWAYS, AND AS TO THE TAX IMPOSED ON THE BUSINESS, MAY BE REASONABLY APPLIED TO PRIVATE CARRIERS FOR COMPENSATION FOR THE PRIVILEGE OF TRANSPORTING FOR HIRE AS A BUSINESS ON THE PUBLIC ROADS OF THE STATE IN THE EXERCISE OF THE POLICE AND TAXING POWER OF THE STATE TO CONSERVE THE PROPER USE OF THE PUBLIC HIGHWAYS AND TO SERVE PROPER SOVEREIGN PURPOSES, AND THAT THESE REQUIREMENTS ARE SEVERABLE FROM THE OTHER REQUIREMENTS OF THE STATUTE WHICH MAY BE LEGALLY APPLICABLE ONLY TO COMMON CARRIERS, AND ARE NOT INTENDED TO BE APPLIED TO CORPORATIONS AND PERSONS WHO ARE NOT COMMON CARRIERS.

The sixth and seventh assignments of error filed by the appellant (Record, pages 51 and 52) are to the effect that the Supreme Court erred in holding and deciding that the State of Florida may validly convert the private property of appellant used exclusively in the business of a private carrier into public carrier property by compelling appellant as a condition to carrying private property by private contract over the highways of the State of Florida to submit himself to the jurisdiction of the Railroad Commission of the State of Florida, assume the burdens and duties of a common carrier and thus dedicate his property to public use and become a common carrier, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

It is only necessary to refer to the opinion filed by the Supreme Court of Florida to demonstrate that these

assignments of error cannot be sustained for the simple reason, if no other, that the court has never made any such holding as that complained of.

On the contrary the Florida Supreme Court distinctly recognizes that the Legislature would have no authority to compel a motor vehicle carrier to subject himself to the jurisdiction of the Railroad Commission of Florida to the extent of assuming the duties and burdens of a common carrier and thus dedicate his property to public use and be a common carrier in order to use the highways of the State of Florida for public carriage for hire.

The opinion of the Court announces a directly contrary holding announcing that insofar as Chapter 13700, Acts of 1929, contains provisions and regulations **which are peculiarly applicable only to the business of common carriers** that such regulations do not apply to the appellant, nor is the appellant being arrested and prosecuted for failing to comply with any such regulations. (See Opinion of the Court, pages 45 to 46.)

What the appellant is being arrested and prosecuted for, is his failure to apply for a certificate of public convenience and necessity and his failure to pay the mileage tax provided for by the statute.

Appellant seems to be under the impression that if he applies for a certificate of public convenience and necessity and obtains one, that he will thereby submit himself to become a common carrier.

This is not true because the Supreme Court of Florida has said that no such legal effect will be imputed to the obtaining of a certificate by a private carrier, and even if the Railroad Commission of Florida should later attempt to visit on the appellant as a certificate holder any provision of the statute which could not be legally applied to a private contract carrier, he would have his remedy by due course of law to avoid compliance with that particular unlawful feature or regulation.

In this respect the holding of this Court in the Cargill case, supra, is a complete answer to these assignments of error.

POINT 7.

THE "MILEAGE TAX" LEVIED BY THE STATUTE IS NOT A "TOLL" COLLECTED FOR VEHICULAR PASSAGE OVER THE ROADS, BUT IS A LICENSE TAX IMPOSED UPON THE INTRASTATE BUSINESS OF TRANSPORTATION FOR COMPENSATION ON THE PUBLIC ROADS OF THE STATE, AND BEING A LICENSE TAX IMPOSED UPON THE BUSINESS BY STATUTE FOR PUBLIC PURPOSES, IT DOES NOT VIOLATE ANY PROVISION OF THE FEDERAL HIGHWAY ACT PROHIBITING "TOLLS."

Appellant also alleges the Florida statute to be unconstitutional because he says it violates the terms of the Federal Highway Act, commonly known as the United States Federal Aid law.

> Chapter 241, 39 Statutes at Large 355, as amended February 28th, 1919, Chapter 69, 40 Statutes at Large, 1189-1200; Compiled Statutes, 7477 bb, and the Federal Highway Act, November 9th, 1921; Chapter 119, 42 Statutes at Large, 212, Compiled Statutes 7477¼a.

In passing upon this point the Florida Supreme Court held:

> "The 'mileage tax' levied by the statute is a license tax imposed upon the intrastate business of transportation for compensation on the public roads of the State; and being a license tax imposed upon the business by statute for public purposes, it is not in law or in fact a 'toll' collected for vehicular passage over the roads, it not being collected for mere passage over the roads or 'exacted when and as the privilege of passage is exercised'."

(See Record, page 46.)

The Act itself provides that the mileage tax in question shall be in lieu of all other taxes and fees of every kind, character and description levied by the State of Florida, except ad valorem taxes levied upon the property of auto transportation companies and except the gasoline tax collected upon fuel sold for use in operating such vehicles. See Section 14, Chapter 13700.

The mileage tax provided for in the Act is not a toll for the use of the highways, but is an exaction in the form of a mileage tax to pay the cost of construction, maintenance and repair of the highways, and the administration and enforcement of laws governing the use of the same. The tax is laid on the business involving a use of the State's highways and not on the mere passage over the highways for the privilege of passage **per se.**

Such a tax has been held by this Court in a recent case not to violate any provision of the Federal Highway Act above referred to.

> Carley and Hamilton vs. Snook, 281 U. S. 66, 74 L. Ed. 704.
> (Williams vs. Riley, 280 U. S. 78, 74 L. Ed. 175.)

It is doubtful as to whether this question is before this Court in a proper way in this case since no showing is made by the record that the appellant (Smith) intended to confine his business or was confining his business exclusively to Federal Aid highways. It may be that the Supreme Court of Florida could take judicial notice as to what highways are Federal Aid highways in this State and it may be true that a considerable portion of the traveling done by the trucks owned by appellant is done over such Federal aid highways. **Non constat** the appellant was using the streets of Jacksonville and other roads which are public highways but not a part of the Federal system, consequently, became liable to the mileage tax for the use of these roads at least.

However, it is obvious that Section 14 does not impose nor undertake to impose a toll for the use of either State or Federal highways. The mileage tax in question is only

collectible by the Comptroller from those auto transportation companies, who have applied for and been granted certificates of public convenience and necessity permitting them to engage in the transportation of passengers or freight or both under the terms of the Act.

The tax in question while measured by the amount of mileage travelled by the licensee under the Act is really a tax on the special privilege which is embraced in the right to obtain and use a certificate of public convenience and necessity.

The rights conferred by a certificate issued under the Act are rights upon which the State has the legal and constitutional right to exact a tax, either in a flat amount or measured by the mileage travelled or the business done under the certificate.

The certificate operates as a protection to the licensee against certain burdens, which would otherwise be imposed upon it, as, for example, under Section 11 of the Act, an auto transportation company is permitted to operate motor vehicles on the public highways at a speed in excess of the ordinary speed otherwise permitted by the laws of Florida, while under Section 5 of the Act, the holder of such a certificate is protected from liability to comply with the local requirements of city and town ordinances as to regulation and taxation.

The mileage tax is consequently not a toll for the use of the highways, but is in the nature of a tax upon the franchise or license, which is embraced in a certificate of public convenience and necessity when used under the Act, although the amount of such tax may be measured by the number of miles travelled under such a certificate.

In **Hiers vs. Mitchell, 116 Southern, text 85**, the Florida Supreme Court defined a tax as an enforced contribution of money or other property assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses.

Applying this definition to the exaction required by Section 14 of Chapter 13700, it is plain that such exaction is a tax and not a toll. Indeed, the Act itself positively and in terms denominates the same as a tax as will be seen from the following quoted portion of Section 14:

> " * * * Provided further, that the mileage tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, except ad valorem taxes levied upon the property of such auto transportation companies and except the gasoline tax, and except the motor vehicle license tax as now provided for in Section 1285 (1011) Compiled General Laws of Florida, 1927; said motor vehicle license tax to be paid into the State Treasury and disposed of as provided for in Section 1304 (1031), Compiled General Laws of Florida, 1927, * * *"

POINT 8.

CHAPTER 13700, ACTS OF 1929, DOES NOT DENY THE APPELLANT THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION. A CLASSIFICATION HAVING SOME REASONABLE BASIS DOES NOT OFFEND AGAINST THAT CLAUSE MERELY BECAUSE IT IS NOT MADE WITH MATHEMATICAL NICETY OR BECAUSE IN PRACTICE IT RESULTS IN SOME INEQUALITY. THE STATE HAS POWER TO CLASSIFY IN THE ADOPTION OF POLICE LAWS, AND ONE WHO ASSAILS A CLASSIFICATION IN SUCH LAW MUST CARRY THE BURDEN OF SHOWING THAT IT DOES NOT REST UPON ANY REASONABLE BASIS BUT IS ESSENTIALLY ARBITRARY.

One of the provisions of the Act is that it shall not apply to "corporations or persons engaged exclusively in the transportation of children to or from school, or

any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs or hotel busses from a depot to a hotel in the same town or city." (See paragraph "h," Section 1, Chapter 13700.)

Such a distinction in legislation of this character is not deemed to be arbitrary if any reasonable facts can be thought of to sustain it.

Rast vs. Van Deman & Lewis Co., 240 U. S. 342; L. R. A. (1917-A) 421; (Florida case).

The fact that the act could have been extended to embrace those who are excluded is not necessarily proof of unjust discrimination or of denial of equal protection of the laws. All state laws need not be perfect nor is it necessary that they cover the entire field of permissible legislative action at one time.

Middleton vs. Texas Power and Light Co., 249 U. S. 152.
Rosenthal vs. New York, 226 U. S. 260.

Even the crudities and injustice of state laws cannot be redressed by the Fourteenth Amendment to the United States Constitution. A wide field of legislative discretion is accorded to the legislature both in the selection of subjects and in the extent to which the subject shall be legislatively dealt with.

Heath & Milligan Co. vs. Worst, 207 U. S. 355.
Chicago Dock & Canal Co. vs. Fraley, 228 U. S. 680.

Local conditions known to the Legislature but unknown to the courts may have a large bearing on a case involving a claim of denial of equal protection of the

laws, and if the court can conceive of any local conditions which will warrant the classification made, the courts will not interfere to strike the legislation down as a denial of equal protection of the laws.

Dominion Hotel Co. vs. Arizona, 249 U. S. 265.

The Supreme Court of the United States has sustained laws particularly regulating wholesale dealers in oils while not undertaking to deal with wholesale dealers in any other commodity.

S. W. Oil Co. vs. Texas, 217 U. S. 114.

There is a strong presumption that discriminations in state legislation are based on adequate grounds, and the mere fact that a law regulating certain classes might have included others does not condemn it under the equal protection clause.

Middleton vs. Texas Power & Light Co., 249 U. S. 152.

The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction that may be subjected to criticism. There is a strong presumption that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by its experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. Even if the act might well have extended to other classes of persons, this would not amount to a constitutional objection.

Patsome vs. Pennsylvania, 232 U. S. 144.
Keokee Coke Co. vs. Taylor, 234 U. S. 224 (227).

The 14th Amendment does not prohibit state legislation special in character. The Legislature may deal with

a class which it deems a conspicuous example of what it seems to prevent, altho logically that class may not be distinguishable from others not embraced by the law. The Federal courts cannot review the economics of facts upon which the Legislature of a State bases its conclusions. On this principle it has been held by the Supreme Court of the United States that a classification which affects only those who deal in more than one place in the state is not necessarily so unreasonable as to deny equal protection of the laws.

Central Lumber Co. vs. South Dakota, 226 U. S. 157.

Raymann Brewing Co. vs. Brister, 179 U. S. 445.

It has even been held that a classification may be made based on size alone.

Engel vs. O'Mally, 219 U. S. 126.

Where it does not appear upon the face of the statute or from facts of which the court can take judicial notice, that it infringes rights secured by the fundamental law, the Legislature's determination of questions of policy is conclusive on the courts. The power which the legislature has to promote the general welfare is very great, and the employment of means to that end is very large. The possibility of the abuse of legislative power does not disprove its existence.

Powell vs. Pennsylvania, 127 U. S. 678 (685).
Am. Sugar Refining Co. vs. La., 179 U. S. 89.

No rule is better settled than the one that constitutionality of a classification made is to be determined by considering whether there is any basis for the classification made by the statute.

Finley vs. California, 222 U. S. 28.

One of the leading United States Supreme Court decisions on the subject of classifications in legislation is:

Lindley vs. Natural Carbonic Gas Co., 220 U. S. 61 wherein was laid down the principle enunciated by the Florida Supreme Court in Hiers vs. Mitchell, 116 So. 81, wherein the Court said:

> "The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and is purely arbitrary. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
>
> When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> One who assails the classification in such law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Hiers vs. Mitchell, 116 So. Text 86.

Applying the foregoing principles, let us see whether or not the appellant has made it appear that no state of facts can be conceived, that would sustain the classifications made.

Strictly speaking, the law does not make exemptions of the classes of persons hereinbefore referred to, but rather by way of explanatory language makes it clear that certain lines of business shall not be construed as being within the scope of the subject dealt with by the act, and therefore excluded from its intent, altho apparently within its terms if broadly interpreted.

The first class dealt with is that class of persons and corporations engaged in hauling school children. As

a matter of fact, the statement of this exception is probably unnecessary, because the children are usually hauled free on contracts with the school authorities and would not be within the purview of the act anyway. At any rate, this exception merely follows out the same kind of exception which has been in the motor vehicle license law for many years:

> "* * * Provided, further, that motor vehicles used for transporting school children to and from school under contract with school officials shall not be deemed to be in use for hire."
>
> Section 1280, Comp. Gen. Laws.

The next class excluded are those engaged **exclusively** in the transporting agricultural, horticultural, dairy and other farm products and fresh and salt fish and shrimp from **point of production** to the assembling or shipping point **en route to the primary market.** This exception also follows a similar one made in the general motor vehicle license law and was no doubt made for the same reasons:

> "* * * Provided, that motor vehicles temporarily used by farmers for the transportation of agricultural or horticultural products from farms or groves to packing houses or to points of shipment by transportation companies shall not be held to be operated for hire."
>
> Section 1280, Comp. Gen. Laws.

It will be noted that general traffic in agricultural, horticultural, dairy, farm and fish products is not excepted from Chapter 13700, but only that part of such traffic which is **exclusively** confined to hauling products "from the point of production to the assembling or shipping point en route to primary market."

It is a well known fact that the movement and hauling referred to is both temporary and seasonal. There is a limited season, as well known to everybody, including the legislature, in which fruits and vegetables can be trans-

ported from point of production to primary market. Likewise with fish and oysters, the legally closed season on fish, oysters and shrimp necessarily makes movements of these articles seasonal and temporary also, and of no great volume.

The volume alone, which is very small, of the movement of these various products from point of production to primary market (which is the limit of the exception) when compared to the whole traffic covered by Chapter 13700, is itself a sufficient basis of classification. As we have seen before in this brief, size alone has been held by the Supreme Court of the United States to justify a classification.

> Engel vs. O'Malley, 219 U. S. 126.
> Noble vs. Carlton (Fla. Milk Law case) decided by Three-Judge Federal Statutory Court, Jan. 3, 1930, reported in 36 Fed. (2nd) 967.

In this connection, the following quotation from the opinion of the Supreme Court of the United States is pertinent to show the propriety of basing classifications on local conditions which the legislature might know but which the Court cannot definitely know:

> "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the state 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' Armour & Co. vs. North Dakota, 240 U. S. 510, 517. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the Legislature of Arizona

could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. Hebe Co. vs. Shaw, 248 U. S. 297, 303. Of course, this is especially true when local conditions may affect the answer, conditions that the Legislature does but that we cannot know."

Dominion Hotel Co. vs. Arizona, 249 U. S. text 268.

In making the classifications dealing with haulers of agricultural, horticultural, dairy, farm and fish products, from point of production to primary markets, the Legislature had knowledge of the fact that such movements are seasonal and temporary, that they cannot always move on a fixed schedule on regular routes or between fixed termini, that the volume of this movement is small compared to the general movement of commodities over the highways otherwise, and that the traffic was in perishable commodities and commodities which are the necessities of life. The exception made had already been made in other State statutes which have been in force and unchallenged for years. It is confined to those who hauled the named perishables **exclusively**. It is furthermore confined to that portion of the distributive haul which lies between the point of production and the primary market or packing houses **only**, and does not extend to general traffic from the markets to the consumer or between dealers.

Such a classification is clearly justified and has not been overturned in the manner required by Hiers vs. Mitchell, supra.

The last exception is that of taxicabs and hotel busses. It is not hard to conceive why these are excluded. Taxicabs are usually operated only in cities and towns, usually those of some size and incorporated. Nearly every one of them is subject to local municipal control, requirements

of indemnity bonds, taxation and the like. They deal only with passengers and generally neither operate on regular schedules between fixed termini or over regular routes. Because of these factors, the terms of Chapter 13700 excepts them.

In the case of:

State vs. LeFebvre, 219 N. W. 167,

The Supreme Court of Minnesota sustained a statute similar to Chapter 13700 which excepted persons who hauled school children ,and those who transported farm and dairy products from its operation, as against the same kind of attack made on the Act in question here.

In the last cited case the court dealt with and sustained as constitutional a provision of the Minnesota law which contained a clause excepting from its operation "motor vehicles used exclusively in transporting children to or from school, and motor vehicles used by any transportation company engaged exclusively in transporting agricultural, horticultural, dairy or other farm products from the point of production to the primary market, or to motor vehicles used exclusively in transporting or delivering dairy products or to motor vehicles engaged exclusively in transporting or delivering freight within any city or village in this State or between contiguous villages or cities, or by any transportation company engaged in operating taxicabs, or hotel busses to or from a depot to a hotel."

Chapter 13700 does not deny to appellant the equal protection of the laws, because of the classifications made. Innumerable classifications of all kinds, as varied as the exigencies of occasions required or ingenuity could suggest have been upheld.

The following are only a few of these selected at random:

Classifying railroads:

M. P. Ry. Co. vs. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107.

M. & St. L. Railway Co. vs. Beckwith, 129 U. S. 1, 9 Sup. Ct. 207, 32 L. Ed. 585.

C. N. O. & T. P. R. R. vs. Kentucky, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414.

Tullis vs. Lake Erie & Western, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192.

Aluminum Co. vs. Ramsey, 222 U. S. 251, 32 Sup. Ct. 76, 56 L. Ed. 185.

Classifying the succession to property:

Magoun vs. Illinois Trust and Savings Bank, 170 U. S. 294, 18 Sup. Ct. 599, 42 L. Ed. 1043.

Classifications of coal mines exempting those not employing more than five (5) men from its operations:

Consolidated Coal Co. vs. Illinois, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872.

And those employing not over ten (10) persons:

McLean vs. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315.

An act exempting banks and trust companies from the operation of the usury law:

Griffith vs. Connecticut, 218 U. S. 563, 31 Sup. Ct. 17, 54 L. Ed. 1151.

Laws forbidding aliens not eligible to citizenship from acquiring and leasing land:

Porterfield vs. Webb, 263 U. S. 225, 44 Sup. Ct. 21, 68 L. Ed. 278.

Webb vs. O'Brien, 263 U. S. 313, 44 Sup. Ct. 112, 68 L. Ed. 318.

Frick vs. Webb, 263 U. S. 326, 44 Sup. Ct. 115, 68 L. Ed. 323.

Excluding foreign corporations from the exemption of an inheritance tax on property devised for educational and religious purposes:

Board of Education vs. Illinois, 203 U. S. 553, 27 Sup. Ct. 171, 51 L. Ed. 314; 8 Anno. Cases 157.

Exemption from taxation of companies whose gross annual income did not exceed a given figure:

Citizen's Telephone Co. vs. Fuller, 229 U. S. 322, 33 Sup. Ct. 833, 57 L. Ed. 1206.

Jackson vs. Fuller, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215.

A franchise tax exempting corporations wholly engaged in manufacturing or mining within the State:

People vs. Roberts, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. Ed. 323.

The exemption of subways from special franchise taxes:

People, ex rel., Metropolitan Street Railway Co. vs. State Board of Tax Commissioners, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65; 4 Anno. Cases 381.

People, ex rel., Brooklyn City Railroad Co. vs. State Board of Tax Commissioners, 199 U. S. 48, 25 Sup. Ct. 713, 50 L. Ed. 79.

People, ex rel., Twenty-third Street Railway Co. vs. State Board of Tax Commissioners, 199 U. S. 53, 25 Sup. Ct. 715, 50 L. Ed. 85.

An act forbidding the employment of women for more than eight hours a day but exempting nurses and others employed in hospitals:

Bosley vs. McLaughlin, 236 U. S. 385, 35 Sup. Ct. 345, 59 L. Ed. 632.

Virtually all Workman's Compensation Acts exempt from their provisions certain classes of employers, such as farmers and domestics, and practically all of them, are, by their terms, inapplicable to persons employing a certain minimum number of servants:

Jeffry Mfg. Co. vs. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364.

N. Y. Central Railroad vs. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917-D 1.

Annotated Cases 1917-D, 629.

Middleton vs. Texas Power and Light Co., 249 U. S. 152, 39 Sup. Ct. 227, 63 L. Ed. 527.

The Kansas Banking Act preferring depositors against other creditors was held to constitute no unlawful discrimination:

Assaria State Bank vs. Dolley, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123.

The New York Housing Laws applicable only to landlords renting dwelling houses was sustained as affording a reasonable classification.

Marcus Brown Holding Co. vs. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877.

The Florida Act of 1913 imposing an additional tax on vendors of goods, accompanied by coupons, profit-sharing certificates, etc., was a reasonable classification:

Rast vs. Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917-A, 421.
Annotated Cases 1917-B, 455.

And the Florida statute of 1913 imposing an employer's liability on those operating boats propelled by steam, gas or electricity but excepting sailing vessels, was held to be constitutional.

The Merrimac, 242 Fed. 572.

Probably the strongest case upholding the power of the Legislature to classify, is Erb vs. Morasch, 177 U. S. 586, 20 Sup. Ct. 819, 44 L. Ed. 897. In that case the City Council of Kansas City passed an ordinance regarding the running of railroad trains. It was made unlawful to operate any train of cars at a greater speed than six miles an hour. Section "8" of the ordinance excepted by name the Interstate Rapid Transit Railway Company of Kansas City. The Supreme Court of the United States held that this did not make an arbitrary and unreasonable classification in denial of the equal protection of the laws. Mr. Justice Brewer saying:

"With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains."

POINT 9.

THE TAX IS NOT CONFISCATORY NOR UNREASONABLE IN A CONSTITUTIONAL SENSE, NOR IS THERE ANY BASIS FOR THIS COURT TO SO DECLARE ON THE RECORD HERE PRESENTED.

A sufficient answer to this contention is found in the following quotation of a recent opinion handed down by the Supreme Court of the United States:

"Even if the tax should destroy a business it would not be made invalid or require compensation on that ground alone. Those who enter upon the business take that risk (citing cases). We need not consider whether abuses of the power might go to such a point as to transcend it, for we have not such a case before us. The acts must be judged by their contents, not by the allegations as to their purpose in the complaint. We know of no objection to exacting a discouraging rate as the alternative to giving up a business when the Legislature has the full power of taxation. The case is different from those where the power to tax is limited to inspection fees and the like as in Postal Telegraph-Cable Co. vs. Taylor, 192 U. S. 64, 72."

See Alaska Fish Co. vs. Smith, 255 U. S. text 48-49.

We are not called on in this case to consider an alleged abuse of the legislative power to levy license taxes. It is a matter of common knowledge that a number of bus and truck operators have applied for and been granted cer-

tificates of public convenience and necessity and are now operating a profitable business and paying the taxes collectible under Chapter 13700. The fact that the particular business being conducted by the appellant, E. S. Smith, does not permit him to pay the taxes and make a profit on his haul, even if that be admitted to be true, would not render the law unconstitutional as confiscatory.

Laws levying license taxes will not be held void as unreasonable and arbitrary unless the amount of the tax is so great or the classification so palpably arbitrary as to be beyond the necessity for the legislation or equivalent to an impairment of constitutional rights of property or tend to prevent a great number, if not all persons, from pursuing otherwise lawful occupations, which do not impair public safety, public health or injure public property.

State vs. Allen, 83 Florida 219; 91 Southern 104.

Legislative regulations imposing license taxes will not be interfered with unless purely arbitrary and unreasonable from every conceivable view.

Pen. Cas. Co. vs. State, 68 Florida 411.
Pullman Co. vs. Knott, 70 Florida 9; 69 Southern 703; 243 U. S. 447.

The Florida Constitution contains no limitation upon the power of the Legislature to impose license taxes within its jurisdiction except with due process and equal protection and contract rights shall be observed and interstate commerce shall not be burdened or the exercise of Federal power interfered with.

Amos vs. Gunn, 84 Florida 285; 94 Southern 615.

The reasonableness of a tax is for the Legislature and not for the courts to determine when taxes are levied by

the Legislature itself which has plenary power over the subject, but even where the reasonableness can be inquired into as in the case of taxes imposed by municipal corporations under delegated authority, the reasonableness of a tax upon an occupation or business cannot be determined by the extent of the business of a single individual since there may be competition or negligence or other circumstances affecting the extent of the business which cannot be charged to the taxing power.

Western Union Tel. Co. vs. Decatur, 81 Southern 199.

As pointed out above the Court has no power to strike down a tax as confiscatory unless it has a tendency to so operate under every conceivable circumstance. The mere fact that some business cannot profitably go on and pay the tax is not the test, as the Legislature has constitutional power to impose a discouraging rate of taxation as we have pointed out.

At the same time the many busses and trucks now operating under the law and paying the tax furnish an ample testimonial to the fact that there are many conceivable circumstances where the tax has been found to be perfectly reasonable.

This Court will have to write a new doctrine of constitutional law as applied to taxation in order to hold that it will measure the constitutionality of a tax in the way it measures the constitutionality of a law fixing a particular scale of public utility rates and enter into an investigation of the subject of whether or not a particular business can make enough money to profitably operate and pay taxes.

POINT 10.

NO SHOWING HAS BEEN MADE THAT THE STATUTE VIOLATES SECTION 10 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES OR THAT IT IMPAIRS THE OBLIGATION OF CONTRACTS HELD BY THE APPELLANT.

The above point was not argued in the Court below nor passed upon by that Court.

It is respectfully submitted that the point is not properly presented nor raised in this Court on the record here.

However, it has been held by this Court that those who are subject to regulation by the State in the exercise of its police power cannot prevent or postpone the exertion by a State of that power by interposing the contract clause of the Federal Constitution as an obstacle to the exertion of that power.

Hudson County Water Co. vs. McCarter, 209 U. S. 349 (357).

Knox vs. Lee, 12th Wall. 457, (550,551).

C. B. & Q. R. R. Co. vs. McQuire, 219 U. S. 549 (567).

A. C. L. R. R. Co. vs. Goldsboro, 232 U. S. 548 (558).

Union Drygoods Co. vs. Georgia Public Service Commission, 248 U. S. 372.

Producers Transportation Co. vs. Railroad Commission, 251 U. S. 228 (232).

If, therefore, the State of Florida had the power to pass an Act regulating contract carriers for hire by requiring them to secure a special permit to use the highways of the State for the transaction of their business and by requiring them to pay a special tax for the privilege granted, the fact that Smith, the appellant, as a particular contract carrier had a special contract for

the hauling of goods, cannot operate to defeat the validity of the Florida statute, as we have pointed out in our citation of the foregoing holdings of this Court.

If the appellant applies for and obtains a certificate of public convenience and necessity and pays the tax required of him by the Florida law, he can still perform whatever contract he may have with the others who have employed him to haul their goods.

Thus far the record does not disclose that he has ever attempted to secure a certificate of public convenience and necessity, nor made any effort to pay the tax imposed upon the privilege involved in such a certificate.

We, therefore, respectfully insist that there is nothing in the assignment of error based upon this proposition which the Court can consider on the record now before the Supreme Court of the United States in this case.

CONCLUSION

It is respectfully submitted that this Court should affirm the judgment of the Supreme Court of Florida.

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APPENDIX TO BRIEF

CHAPTER 13700, ACTS 1929
LAWS OF FLORIDA
(SENATE BILL NO. 87)

AN ACT Providing for the Supervision and Regulation of Persons, Firms, Corporations and Associations Owning, Controlling, Operating or Managing Motor Vehicles Used in the Business of Transporting Persons or Property for Compensation Over the Public Highways of the State; Defining Auto Transportation Companies and Providing Supervision and Regulation Thereof by the Railroad Commission of the State of Florida and Providing for the Enforcement of the Provisions of This Act and for the Punishment of Violations Thereof and Imposing a Mileage Tax and Providing for the Disposition of the Revenue Raised by the Same; and Repealing All Acts Inconsistent with the Provisions of this Act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Definitions:

(a) The word "Commission" means the Railroad Commission of this State.

(b) The term "Corporation" when used in this Act means a corporation, a company, association, or joint stock association.

(c) The term "person" means an individual firm or co-partnership.

(d) The word "certificate" means the Certificate of Public Convenience and Necessity authorized to be issued under the provisions of this Act.

(e) The term "public highway" means every public street, road or highway in this State.

(f) The term "motor vehicle" shall include all vehicles or machines propelled by any power other than muscular used upon the public highways for the transportation of persons or property for compensation as common carriers, except motor vehicles used exclusively in transporting children to or from school, and motor vehicles used by a transportation company engaged exclusively in transporting agricultural, horticultural, dairy or other farm products from the point of production to the primary market, or to motor vehicles used exclusively in transporting or delivering dairy products, or by any transportation company engaged in operating taxicabs, or hotel busses to or from a depot to a hotel in the same town or city.

(g) The words "between fixed termini or over a regular route" when used in this Act means the termini or route between or over which any auto transportation company usually or ordinarily operates any motor vehicle, even though there may be departures from said termini or route, whether such departures be periodical or irregular, whether or not any motor propelled vehicle is operated by any auto transportation company "between fixed termini or over a regular route" within the meaning of this Act, shall be a question of fact to be determined by the Commission, and the finding of the Railroad Commission thereon shall be final except as to appeal and review as hereinafter provided.

(h) The term "auto transportation company" when used in this Act means every corporation or person, their lessees, trustees or receivers, owning, controlling, operating or managing any motor-propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route; Provided, That the term "auto transportation company" as used in this Act, shall not include corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural,

dairy or other farm products and fresh and Salt Fish and Oysters and Shrimp from the point of production to the assembling or shipping point enroute to primary market or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxi-cabs, or hotel busses from a depot to a hotel in the same town or city. That those passenger busses, that operate over a definite route on regular schedules and which are regulated by the legislative body of a city, furnishing public transportation wholly within the corporate limits of any city or between cities whose boundaries adjoin, are hereby expressly excluded from the provisions of this Act.

(i) For the purpose of this Act all vehicles equipped to carry a load which are attached to and drawn by a motor vehicle are hereby defined as trailers and shall be classed as motor vehicles and subject to the provisions of this Act.

(j) The term width of tread means the width of the vehicle measuring from the center of the tread of outside tire to the center of tread of the opposite outside tire.

Section 2. No auto transportation company shall operate any motor vehicle for the transportation or persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future public convenience and necessity requires or will require such operation, but no certificate shall be required for operation exclusively within the limits of an incorporated city or town. The Railroad Commission may at any time for a good cause suspend and upon notice to the grantee of any certificate an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this section.

Section 3. Application for such Certificate of Public Convenience and Necessity shall be made by such corporation, person, firm or association, their lessees, trustees, or receivers to the Railroad Commission; such ap-

plication shall be in writing verified by the applicant and shall specify the following matters.

1. The name and address of applicant and the names and addresses of its officers, if any.

2. The public highway or highways over which, and the fixed termini or the regular route, if any, between which, or over which applicant intends to operate.

3. The kind of transportation, whether passenger or freight, or both, in which applicant intends to engage, together with a brief description of each vehicle and motor power which applicant intends to use, including the seating capacity thereof, if for passenger traffic, or tonnage, if for freight traffic, and including the size and weight of such vehicles.

4. The proposed time schedule of operation.

5. The schedule or tariff, showing all passenger fares or freight rates proposed to be charged between the several points or localities to be served.

6. Whether or not the said applicant is or has been operating on said routes or other routes in the State, and for what length of time and upon what time schedule of operation and upon what schedule or tariff for passenger fares or freight rates.

Upon filing of said application the Railroad Commission shall fix a time for hearing of said application, which shall not be less than five days nor more than thirty days subsequent to the filing of said application, and no application shall be granted or a Certificate of Convenience and Necessity issued without a hearing by the Railroad Commission. Notice of such hearing shall be given to the applicant and to all transportation companies serving any part of the route between the fixed termini and to the mayor or chief magistrate of each city and town in or through which the applicant desires to operate at least five full days prior to said hearing, which said notice shall recite the fact of the filing of such application, the time and the place of the hearing of the same. A copy of said notice shall be mailed at least five

days prior to the time for such hearing to any transportation company holding a Certificate of Public Convenience and Necessity and operating over the route or any part of the route specified in said application.

At the time specified in said notice, or at such time as may be fixed by the Commission, a public hearing upon said application shall be held by the Commission. At or after such hearing the Commission may issue a Certificate of Public Convenience and Necessity, as prayed for or refuse to issue the same, or may issue the same with modification, or upon such terms and conditions as in its judgment the public convenience and necessity may require; Provided, That in granting application for certificate, the Commission may take into consideration the length of time the applicant has operated a scheduled motor vehicle service between the termini named in the application; the general standard of the service maintained during this period; the reliability of the applicant and his sense of responsibility toward the public as shown during the period of his operation; his court record as well as the effect that the granting of such certificate may have upon other transportation facilities within the territory sought to be served by such applicant, and also the effect upon transportation as a whole within said territory and any other matters tending to qualify or disqualify him as a common carrier. Provided, That a Certificate of Public Convenience and Necessity shall upon hearing be granted as a matter of right to such Auto Transportation Companies operating in good faith on the 19th day of April, 1929, over the route for which such certificate shall be sought, who shall comply in full with the provisions of this Act.

When application is made by an Auto Transportation Company for a certificate to operate in a territory or on a line already served by a certificate holder under this Act the Commission shall grant same only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission.

Each Certificate of Convenience and Necessity issued under the provisions of this Act shall contain the following matters:

1. The name of the grantee.

2. The public highway or highways over which, and the fixed termini between which the grantee is permitted to operate.

3. The kind of transportation, whether passenger or freight, or both, in which the grantee is permitted to engage, together with a statement of the number of vehicles to be operated and the maximum seating or tonnage capacity of the vehicle or vehicles which the grantee is permitted to operate.

4. Such additional provisions and limitations as the Commission shall deem necessary or proper to be inserted in the certificate.

No Certificate of Public Convenience and Necessity issued under the provisions of this Act may be assigned or transferred without the consent of the Railroad Commission authorizing such transfer.

No certificate shall be issued for the operation on any highway in the State of any motor vehicles of greater width of tread than eighty-four (84) inches and greater loaded weight than eighteen thousand (18,000) pounds for passenger or freight traffic. The Commission is hereby authorized to prescribe the maximum width of tonneau or body including load of motor vehicles used in either passenger or freight service, taking into consideration the width of road over which the same is to be operated. And the said Commission is further authorized to suspend temporarily, when the condition of the public highway requires it, the operation of motor vehicles, either for passenger or freight transportation, along and over any public highway of the State, and notice of such suspension shall be given to every holder of a certificate for operation over the said highway and to the public by publication in some newspaper or newspapers in general circulation in the territory of the route.

Section 4. The Commission shall, at the time of granting a certificate to operate any transportation company for transporting persons or property, fix and determine the amount of the bond to be given by the applicant for the protection, in case of passenger vehicle, of the passengers and baggage carried in said vehicle and of the public against injury caused by negligence of the person or corporation operating the said vehicle, and in the case of the vehicle transporting freight, for the protection of the said freight so carried and of the public against injuries received through negligence of the person or corporation operating said freight carrying vehicle; and it shall be the duty of the applicant to procure and file with the Commission the said bond for liability and property damage, including loss of baggage when same has been checked in accordance with the rules prescribed by the Commission, giving the said bond or bonds in a surety company authorized to do business in the State of Florida, or deposit in lieu of said surety bonds, bonds of the United States Government or of any city or county in the State of Florida approved by the said Commission. The said bonds shall be conditioned to indemnify passengers and the public receiving personal injuries by any act of negligence, and for damages to property of any person other than the assured; and such bonds shall contain such conditions, provisions, and limitations as the Commission may prescribe, and said bonds shall be payable to the State of Florida, and shall be for the benefit of and subject to action thereon by any person or persons who shall have sustained an actionable injury protected thereby, notwithstanding any provisions in said bond to the contrary, and every bond or insurance policy given shall be conclusively presumed to have been given according to and to contain all of the provisions of this Act. And no certificate shall be valid until such bond has been filed and approved, and no such bond so accepted shall be cancelled by the company issuing the same except upon ten days' notice to the Commission; and upon such notice being given by the company issuing said bond or bonds, the certificate of the per-

son or corporation giving bond shall be revoked, unless a new bond shall be filed and accepted before the date for the cancellation of the said bond; Provided, however, that the applicant may, in the discretion of the Commission, be allowed to file in lieu of bond an insurance policy, which shall be approved by the Commission, with some casualty company or insurance company or casualty or insurance carrier authorized to do business in the State of Florida.

Section 5. The Railroad Commission of the State of Florida is hereby vested with power and authority to supervise and regulate every auto transportation company in the State, to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company, to regulate the service and safety of operations of each such auto transportation company; to prescribe a uniform system and classification of accounts to be used, which among other things, shall set up adequate depreciation charges; to require the filing of annual and other reports and all other data by said auto transportation companies; and to supervise and regulate auto transportation companies in all other matters affecting the relationship between such companies and the traveling and shipping public. The Commission shall have power and authority by order to prescribe rules and regulations applicable to any and all such auto transportation companies. The Commission, in the exercise of the jurisdiction conferred upon it by this Act, shall have power and authority to make orders and prescribe rules and regulations affecting such auto transportation companies, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, city and county, or county, or village, and in case of conflict between any such order, rule or regulation, any such ordinance or permit, the order, rule or regulation of the Commission shall in each instance prevail. No municipality shall have the right to require such auto transportation company to furnish any bond

or insurance policy, or pay any license, fee or tax except as herein provided.

Section 6. Upon the taking effect of this Act, it shall be the duty of every such auto transportation company to forthwith file with its application for a certificate of Public Convenience and Necessity a schedule of its rates and fares, and a time schedule of all motor vehicles operated, all of which shall be kept on file by the Commission, subject to public inspection. The Commission shall require each auto transportation company to keep open for for public inspection at designated offices so much of said schedule of rates and fares and time schedules as it deems necessary for the public information.

Whenever such rates or fares or time schedules are found to be unreasonable, the Commission, upon its own motion, or upon complaint, shall upon hearing as herein provided, prescribe reasonable rates and time schedules to take the place of those found unreasonable, and such new rates shall be filed in place of the rates of schedules superseded. No rates or time schedules filed with the Commission shall be changed by any such auto transportation company without an order of the Commission sanctioning the same. It shall be unlawful for any transportation company to collect or receive a greater or less rate or charges for any service rendered by it than the transportation charge made in the schedules on file with the Commission, and no new rates shall take effect until the date named by the Commission.

Section 7. The Commission may upon complaint, or upon its own motion, that any auto transportation company is violating the provisions of this Act or any of the rules or regulations prescribed by the Commission, or is violating any of the laws of the State, or any requirement of its Certificate of Public Convenience and Necessity, issue its order to the said auto transportation company notifying it to appear before the Commission at a fixed time and place at which time and place the Commis-

sion shall investigate the complaint made, and if it shall be satisfied after such hearing that the said auto transportation company holding a certificate has wilfully violated or refused to observe the laws of this State touching motor vehicles or any of the terms of the certificate issued to the said auto transportation company, or any of the commission's orders, rules or regulations, the said Commission may suspend, revoke, alter, or amend and certificate issued under the provisions of this Act to the said auto transportation company; but the holder of such certificate shall have the right to appeal to the Supreme Court of the State as is now provided by law for appeals from orders relating to railway or street railway corporations.

Section 8. Every rule, regulation, decision, order or requirement made by the said Commission under the provisions of this Act shall be deemed and held to be within its jurisdiction and powers, and to be reasonable and just and such as ought to have been made in the premises, and to have been properly made and arrived at in due form of procedure, and such as can and ought to be executed, unless the contrary plainly appears on the face thereof or can be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears. All presumption shall be in favor of every action of the said Commission and all doubts as to its jurisdiction and powers shall be resolved in its favor. If, in any proceeding to enforce or to attack any rules, regulations, decisions or orders, any part thereof shall be found invalid the Court shall proceed to enforce such portion thereof as may be valid if the same can be done.

Section 9. In all matters of practice and procedure, and all matters of evidence and the rules of evidence and all matters involving the effect of evidence in proceedings before the Commission under the provisions of this Act, and in proceedings by the said Commission to enforce its rates, rules, regulations, decisions, orders, and

requirements made hereunder, and in proceedings against the said Commission in relation to rates, rules, regulations, decisions, orders and requirements prescribed by it, all provisions of law now existing, or which may from time to time be prescribed for observance in like cases arising under the law for the regulation of railroads, railroad companies and common carriers, shall govern and control.

Section 10. The Commission shall, so far as the Constitution of this State permits, exercise all such judicial powers as may be necessary to enable it to enforce or perform any duty, power or function conferred on it by this Act.

Section 11. No Auto Transportation Company shall operate any motor vehicle on the public highways of this State at a speed in excess of the speed now permitted by the laws of this State, but motor vehicles used exclusively for carrying of passengers may be operated at any rate not exceeding forty-five (45) miles per hour.

Section 12. An Auto Transportation Company holding a certificate of Public Convenience and Necessity as provided for in this Act may depart from the route described in such certificate if compelled to detour on account of the closing of roads, or for the purpose of transporting chartered or excursion parties to points not on such route, and not exclusively on a route served by any other certificate holder, and may receive for such service compensation as may be agreed upon between the carrier and the party or parties so served.

Section 13. Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with, or who procures, aids or abets in the violation of any provision of this Act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, or who fails to observe any regulation as to maximum speed of operation or maximum weight of load, of the Railroad Commission, or who procures, aids or abets any corporation or person in his failure to obey,

observe or comply with any such order, maximum speed of operation, maximum weight of load, decision, rule direction, demand, or regulation, or any part or provision thereof, is guilty of a misdemeanor and is punishable by a fine not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

Section 14. There shall be collected by the Comptroller of the State from every Auto Transportation Company as herein defined to which has been granted a Certificate of Public Convenience and Necessity permitting it to engage in the transportation of passengers or freight, or both, a mileage tax of one-half cent (½c) per mile on all busses with a capacity of 10 passengers or less and a mileage tax of three-fourths cent (¾c) per mile on all busses with a capacity of not more than 20 passengers nor less than 10 passengers, and a mileage tax of one cent (1c) per mile on all busses of the capacity of more than 20 passengers; and a mileage tax of one cent (1c) per mile on all trucks with a loaded capacity of less than 5,500 lbs., and a tax of two cents (2c) per mile on all trucks with a loaded capacity of 5,500 lbs., or more coming within the terms of this Act for every mile traveled by the motor vehicles of such Auto Transportation Company over the public highways of this State. This tax shall be paid quarterly beginning October 1, 1929. Provided: That at the time of issuing said Certificate of Public Convenience and Necessity and at the beginning of each calendar quarter thereafter the Comptroller of the State shall collect from each holder of such certificate the sum of Seventy-five Dollars ($75.00) as an advance payment upon the mileage tax herein levied for the ensuing quarter which said amount shall at the end of the quarter be credited to said holder of such certificate and the difference between the said amount and the correct amount of said tax shall be adjusted by the Comptroller with the said holder of such certificate.

In order to ascertain the bus mileage of every passenger bus and the truck mileage of every freight truck traveled by the holders of certificates for such purpose the

Comptroller of the State shall prescribe the books and forms of accounts to be kept by the said holder of such certificate and at the end of each current month the said holder of a certificate shall file with the Comptroller, and a duplicate thereof with the Commission, a statement verified by an officer, if the holder of such certificate is a corporation, or if the holder of such certificate is a person then by such person, showing the mileage made by said holder of such certificate during the said month. Provided further, that the mileage tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, except ad valorem taxes levied upon the property of such auto transportation companies and except the gasoline tax, and except the motor vehicle license tax as now provided for in Section 1285 (1011), Compiled General Laws of Florida, 1927; said motor vehicle license tax to be paid into the State Treasury and disposed of as provided for in Section 1304 (1031), Compiled General Laws of Florida, 1927. The books and records of all auto transportation companies shall be at all times open to inspection of the Comptroller of the State and of the Commission, or any agent by them appointed for such purpose, and if the said holder of such certificate shall fail to make the monthly reports herein prescribed to the Comptroller and to the Commission, or shall fail to keep said books and records as prescribed by said Comptroller of the State then upon notice in writing to said holder of such certificate of such default or defaults and the failure of the said holder of such certificate within five days to make said statement or to keep said records properly the certificate shall be revoked by the Commission, but the Commission shall, if requested by the said holder of such certificate, order a hearing upon the question of the revocation of such certificate. The Comptroller of the State shall keep a true and accurate list of all auto transportation companies to whom certificates shall be issued with the postoffice address of each.

Section 15. It shall be the duty of the Comptroller of the State to keep a separate account of all moneys collected under this Act and any and all moneys so collected after deducting the necessary expenses incurred by the Comptroller of the State in carrying out the provisions of this Act shall be paid to the State Treasurer monthly; the State Treasurer shall credit the Railroad Commission fund with five per cent (5%) of the moneys so collected and paid to him to cover the expenses of the administration of this Act by the said Commission, and shall distribute the balance as follows: To each county whose highway system is used as a part of the route authorized in the Certificate of Public Convenience and Necessity issued to any auto Transportation company its part of said balance in the proportion that the bus mileage traveled over its highway system bears to the entire bus mileage traveled by the motor vehicle of said auto transportation company; such amounts shall be quarterly remitted to the County Commissioners of each of said respective counties by warrant of the Comptroller on the State Treasurer, in like manner as other payments by State warrants are made, to be paid by said County Commissioners to the bond trustees of the county bonds, to be used by said trustees to pay the interest on and provide a sinking fund to retire the County bonds issued for the purpose of constructing the State System or the County System of good roads within said county or to be used by said County Commissioners for said purpose.

Section 16. The Commission shall employ such necessary clerks, inspectors and employees on such terms and conditions as said Commission shall deem advisable and necessary to carry out the provisions of this Act.

Section 17. Neither this Act nor any provision hereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several States of the union except insofar as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress.

Section 18. If any section, sub-section, sentence, clause or phrase of this law is for any reason held unconstitutional such decision shall not affect the validity of the remaining portions of this law. In case the provisions of this law providing for the distribution among the counties of this State of the balance of the net proceeds of all moneys collected under this Act after the five per cent (5%) thereof has been credited to the Railroad Commission fund, is, for any reason declared or found to be invalid then in that event such balance of such proceeds above described shall be paid into the State Road License Fund and shall be used for the construction and maintenance of State roads under the direction of the State Road Department.

Section 19. That no auto transportation company shall charge, demand, collect, or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges applicable to such company as specified in its tariffs filed with and approved by the Commission and in effect at the time; nor shall any such company refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person, firm, copartnership, or corporation, or other organization, or association, privileges or facilities in the transportation of persons or property except such as are regularly and uniformly extended to all; and no such company shall directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents employees, and members of their immediate families; Provided, that auto transportation companies under the Act may exchange free transportation within the limits of this section.

Section 20. That distinguishing number plates shall be prescribed and furnished by the Commission, which plate shall be displayed at all times upon each motor vehicle authorized for operation under this Act, for

which the Commission shall charge and each auto transportation company shall pay a fee of fifty cents each. Transfers of number plates from one vehicle to another are hereby prohibited. The fees derived from the issuance of such number plates shall be paid into the State Treasury to the credit of the Railroad Commission fund.

Section 21. All laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed.

Section 22. This Act shall become effective on July 1st, 1929.

Became a law without Governor's approval.

SECTION 1280, COMPILED GENERAL LAWS OF 1927

Terms "Motor Vehicle," "Local Authorities," "Owner," "Chauffeur," "Trailer," "Semi-Trailer," "Motorcycle," "Side Car," "Solid Tires," "Pneumatic Tires," "Truck," "Tractor," "For Hire," defined. That the term "Motor Vehicle" as used in this Chapter shall include motorcycles, automobiles, motor trucks, and all other vehicles operated over the public streets and highways of this State, and propelled by power other than muscular power, except traction engines, road rollers, and such vehicles as run only upon a track.

"Local Authorities" shall include all officers and public officials of the several counties and municipalities of the State.

"Owner" shall include any person, firm, corporation, or association, controlling any motor vehicle by right of purchase, gift, lease or otherwise.

"Chauffeur" shall include any person operating any motor vehicle as an employee of the owner thereof; provided the term "Chauffeur" shall not apply to a person using a motor driven vehicle as an incident to their employment in some other capacity.

"Trailer" as defined in this Chapter shall include all four-wheel vehicles coupled to or drawn by a motor vehicle.

"Semi-trailer" as defined in this Chapter shall include any two-wheel vehicle coupled to or drawn by any motor vehicle.

"Motorcycle side car" as defined in this Chapter shall include any attachment to a motorcycle for extra conveying capacity, requiring the use of one or more extra wheels.

"Solid tires" as defined in this Chapter shall include all tires of any material or substance, which do not depend upon confined air for the support of the load.

"Pneumatic tires" as defined in this Chapter shall include all tires made of rubber and fabric inflated with air.

"Trucks" as defined in this Chapter shall include any motor vehicle designed or used principally for carrying things other than passengers and includes a motor vehicle to which has been added a cabinet box, platform, rack or other equipment for the purpose of carrying merchandise other than the person or effects of the passengers. Also any unit consisting of tractor and trailer so constructed as to haul merchandise or loads other than persons.

"Tractor" as defined in this Chapter shall include any motor vehicle having four (4) or more wheels designated or used for drawing other vehicles, but having no provision for carrying loads independently.

"For hire" as defined in this Chapter shall include all motor driven vehicles, or trailers hauled by a motor vehicle, in use for transporting persons, commodities or materials for compensation, or such other motor vehicles as may be let or rented to another for a consideration. Provided, that motor vehicles temporarily used by farmers for the transportation of agricultural or horticultural products from farms or groves to packing houses or to points of shipment by transportation companies shall not be held to be operating for hire.

Provided further, that motor vehicles used for transporting school children to and from school under contract with school officials shall not be deemed to be in use for hire.

SUPREME COURT OF THE UNITED STATES.

No. 449.—October Term, 1930.

E. S. Smith, Appellant,
vs.
W. B. Cahoon, Sheriff of Duval County, Florida.

Appeal from the Supreme Court of the State of Florida.

[May 25, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The appellant, a private carrier for hire, was arrested upon a warrant charging him with operating vehicles upon the highways in Duval County, Florida, without having obtained the certificate of public convenience and necessity, and without having paid the tax, required by Chapter 13700, Laws of Florida, 1929. At the preliminary hearing, the appellant challenged the validity of the statute, as applied to him, upon the ground that it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. The appellant was held for trial. Upon return to a writ of *habeas corpus*, the Circuit Court of the county decided that the statute as applied to the appellant was unconstitutional, and the appellant was discharged from custody. This judgment was reversed by the Supreme Court of the State, which upheld the statute. 99 Fla. 178. The case comes here on appeal.

The statute provides for the regulation, through the State Railroad Commission, of "auto transportation companies". These companies are thus defined in section 1 (h):

"The term 'auto transportation companies' when used in this Act means every corporation or person, their lessees, trustees or receivers, owning, controlling, operating or managing any motor-propelled vehicle not usually operated on or over rails, used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route; Provided, That the term 'auto transportation company' as used in this Act shall not include corporations or persons engaged exclusively in the trans-

portation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and Salt Fish and Oysters and Shrimp from the point of production to the assembling or shipping point enroute to primary market or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel busses from a depot to a hotel in the same town or city."

Every auto transportation company as thus defined is prohibited (section 2) from operating "any motor vehicle for the transportation of persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future public convenience and necessity requires or will require such operation." There is an exception in case of operation exclusively within the limits of an incorporated city or town.

Application for such "certificate of public convenience and necessity" (section 3) must set forth certain information with respect to the applicant and proposed service. Upon hearing, the Commission may issue the certificate as prayed for, "or refuse to issue the same, or may issue the same with modification, or upon such terms and conditions as in its judgment the public convenience and necessity may require." The Commission may take into consideration various matters bearing upon the applicant's previous operation and reliability, as well as the effect that the granting of the certificate may have upon "other transportation" facilities and upon "transportation as a whole" within the territory sought to be served, and "any other matters tending to qualify or disqualify" the applicant "as a common carrier." It is further provided that, upon hearing, the certificate shall be granted "as a matter of right" to such auto transportation companies as were operating in good faith on the nineteenth day of April, 1929, over the route for which the certificate is sought, "who shall comply in full with the provisions of this Act." When application is made for a certificate "to operate in a territory or on a line already served by a certificate holder" the Commission shall grant the certificate "only when the existing certificate holder or holders serving such territory fail to provide service and facilities to the satisfaction of said Commission."

The following provision as to the giving of a bond in connection with the application for certificate is found in section 4:

"The Commission shall, at the time of granting a certificate to operate any transportation company for transporting persons or property, fix and determine the amount of the bond to be given by the applicant for the protection, in case of passenger vehicle, of the passengers and baggage carried in said vehicle and of the public against injury caused by negligence of the person or corporation operating the said vehicle, and in the case of the vehicle transporting freight, for the protection of the said freight so carried and of the public against injuries received through negligence of the person or corporation operating said freight carrying vehicle; . . . The said bonds shall be conditioned to indemnify passengers and the public receiving personal injuries by any act of negligence, and for damages to property of any person other than the assured; and such bonds shall contain such conditions, provisions, and limitations as the Commission may prescribe, and said bonds shall be payable to the State of Florida, and shall be for the benefit of and subject to action thereon by any person or persons who shall have sustained an actionable injury protected thereby, notwithstanding any provisions in said bond to the contrary, and every bond or insurance policy given shall be conclusively presumed to have been given according to and to contain all of the provisions of this Act. And no certificate shall be valid until such bond has been filed and approved. . . . ."

With the approval of the Commission, the applicant may file an insurance policy in lieu of bond.

The Commission is empowered (section 5) "to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company," to regulate its "service and safety of operations", to prescribe "a uniform system and classification of accounts to be used, which among other things shall set up adequate depreciation charges", to require "the filing of annual and other reports and all other data," and to supervise and regulate it "in all other matters" affecting its relationship with the traveling and shipping public.

Under section 6, every auto transportation company, as defined by the act, must forthwith file, with its application for a certificate, "a schedule of its rates and fares, and a time schedule of all motor vehicles operated" which are to be subject to public inspection. Rates and time schedules are to be changed only with the sanction of the Commission, and it is made unlawful for any

such company to receive a greater or less charge for any service rendered than that shown by the filed schedules.

Violation of any provision of the Act is made a misdemeanor (section 13) punishable by fine or imprisonment, or by both.

Section 14 provides for the collection of a tax from every auto transportation company to which has been granted a certificate of public convenience and necessity. This is a mileage tax graded according to the capacity of the vehicle. The tax is to be paid quarterly in advance, beginning with the issue of the certificate. Five per cent. of the moneys collected are to be used to defray the expense of the administration of the Act, and the remainder is to be distributed among the counties in proportion to the use of their highways (section 15).

Other provisions prohibit discrimination and "free fares" except as stated.

Upon the appeal in this case, the Supreme Court of the State thus construed the statute:

"The statute applies to corporations and persons who use motor-propelled vehicles in the business of transporting persons or property for compensation over public highways in this State between fixed termini or over a regular route, whether such transportation for compensation is as common carriers or as carriers for particular persons under special contract; but the statute does not require private carriers to become common carriers and the provisions of the statute that are legally applicable only to common carriers are not intended to be applied to and are not applicable to corporations or persons who are not common carriers, though engaged in the transportation to which the statute refers; and the provisions of the statute that are legally applicable to private carriers for compensation, are capable of being effectuated, leaving the provisions that are legally applicable only to common carriers to be applied to such common carriers as are governed by the statute. . . . The requirements as to procuring certificates of convenience and necessity for doing the business on the highways and as to the tax imposed on the business may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State, in the exercise of the police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes."

The state court gave no indication as to the particular provisions of the statute which were deemed to be "legally applicable" only to common carriers, or as to those which were considered to be

legally applicable to private carriers, except that it was decided that the latter were bound to procure certificates and to pay the tax.

There is no controversy with respect to the status of the appellant. The Supreme Court said that "he owned and operated two motor propelled vehicles in the business of transporting property for compensation upon the public highways between fixed termini and over regular routes, all within the State, not as a common carrier but as a private carrier under special contract." From the undisputed evidence upon the preliminary hearing, it appears that the appellant was employed under an exclusive contract with the Atlantic & Pacific Tea Company in hauling its merchandise from Jacksonville to various places in Florida. He has never held himself out as a common carrier.

From statements made at the bar, it would appear that the appellant was engaged in the business above mentioned when the Act was passed and hence that he would be entitled to a certificate, provided he complied fully with the provisions of the Act. By the terms of the Act such compliance would be necessary. The appellant did not apply for a certificate, and the principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration. *Gundling* v. *Chicago*, 177 U. S. 183, 186; *Lehon* v. *Atlanta*, 242 U. S. 53, 55, 56; *Hall* v. *Geiger-Jones Company*, 242 U. S. 539, 553, 554. This principle, however, is not applicable where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional right. In the present instance, the appellant has been arrested and held for trial. He is in jeopardy, and the state court, entertaining his application for discharge, has denied the constitutional right asserted. The question of the validity of the statute, upon which the prosecution is based, is necessarily presented.

The statute on its face makes no distinction between common carriers and a private carrier such as the appellant. It applies, without any stated exception, to every auto transportation company within the statutory definition, and this admittedly included the appellant. It not only required an application for a certificate

of public convenience and necessity but that this should be accompanied by a schedule of tariffs, and no such certificate was to be valid without the giving of a bond by the applicant for the protection both of the public against injuries and of the persons or property carried. The State Commission was explicitly vested with authority to supervise "every" auto transportation company that was embraced within the definition, to fix or approve its rates and charges, to regulate its service, to prescribe its method of keeping accounts which should set up adequate depreciation charges, and generally to make rules governing its operations. Schedules of rates of "every such auto transportation company" were to be open to the public and all alterations in tariffs were to be subject to the Commission's control. On the face of the statute, the scheme was obviously one for the supervision and control of those carriers which, by reason of the nature of their undertaking or business, were subject to regulation by public authority in relation to rates and service. No separate scheme of regulation can be discerned in the terms of the Act with respect to those considerations of safety and proper operation affecting the use of highways which may appropriately relate to private carriers as well as to common carriers. All carriers within the Act, whether public or private, are put by the terms of the statute upon precisely the same footing. All must obtain certificates of public convenience and necessity upon like application and conditions. It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the State. See *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, 576-578; *Frost Trucking Company* v. *Railroad Commission*, 571 U. S. 583, 592.

If it be said that the statute contemplated the severability of its requirements in providing (section 18) that if any of its provisions were held to be unconstitutional, the validity of the remaining portions should remain unaffected, the answer is that no line of severance is indicated in the terms of the Act. The effect of this saving clause is merely that, if one provision is struck down as invalid, others may stand. But until such separation has been ac-

complished by judicial decision, the statute remains with its inclusive purport, and those concerned in its application have no means of knowing definitely what eventually will be eliminated and what will be left. This was the situation which confronted the appellant when obedience to the statute was demanded and punishment for violation was sought to be inflicted.

If, ignoring the explicit comprehensiveness of their requirements, it could be said that the provisions of the statute should be severed, so as to afford one scheme for common carriers and another for private carriers such as the appellant, the result would be to make the statute, until such severance was determined by competent authority, void for uncertainty. Either the statute imposed upon the appellant obligations to which the State had no constitutional authority to subject him, or it failed to define such obligations as the State had the right to impose with the fair degree of certainty which is required of criminal statutes. Considered as severable, the statute prescribed for private carriers "no standard of conduct that it was possible to know". *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 221; *Collins* v. *Kentucky*, 234 U. S. 634, 638; *United States* v. *Cohen Grocery Company*, 255 U. S. 81; *Weeds, Inc.* v. *United States*, 255 U. S. 109; *Connally* v. *General Construction Company*, 269 U. S. 385, 391. It is idle to say that one could take a statute of this sort, establishing requirements binding upon private and common carriers alike, and divide its terms so as to make a valid scheme applicable to private carriers. The legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord.

The construction placed upon the statute by the Supreme Court of the State does not avoid the difficulty. It should be observed that this is not an action in equity where the enforcement of a statute awaits the final determination of the court as to validity and scope. There is no controversy as to the facts and the appellant has been held liable to the penalties of the Act for his disobedience to it as it stood when it was enacted. He was entitled at that time to assert his constitutional right by virtue of the invalidity of the statute upon its face. Apart from this consideration, the construction

of the statute by the state court does not determine what terms of the statute are binding upon private carriers such as the appellant. The court states that "the provisions of the statute that are legally applicable only to common carriers are not intended to be applied to and are not applicable to corporations or persons who are not common carriers," and that "the provisions of the statute that are legally applicable to private carriers for compensation are capable of being effectuated, leaving the provisions that are legally applicable only to common carriers to be applied to such common carriers as are covered by the statute." But the court does not point out what provisions are "legally applicable" to private carriers. The decision thus aims to remove the constitutional objection of invalid application only by creating another constitutional objection of lack of appropriate certainty. Had the legislature written into the statute itself that it was binding upon private carriers "only so far as the provisions are legally applicable", it would have transcended the permissible limits of statutory indefiniteness.

Among the provisions of the statute binding upon those who apply for and obtain certificates of public convenience and necessity is one that a bond, or insurance policy, approved by the State Commission, shall be furnished in order to afford security for the public against injuries as well as for the protection of persons and property transported. If we leave on one side the requirement that a certificate holder, who is a private carrier, shall give a bond or policy for the goods carried by him, irrespective of his contract with his employer whose goods he carries, and if we consider only the provision for the protection of the public with respect to the use of the highways, another constitutional difficulty is encountered, that is, of an unconstitutional discrimination. If the provisions of the Act were treated as severable, and requirements relating to the safety of the public are separately considered, we are brought to the terms of the Act with respect to those who are required to obtain certificates of public convenience and necessity and thus to supply the stipulated security. The Act provides that the term auto transportation company, upon which the obligations of the Act are imposed, shall not include "any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and Salt Fish and

Oysters and Shrimp from the point of production to the assembling or shipping point enroute to primary market or to motor vehicles used exclusively in transporting or delivering dairy products." The point with respect to this discrimination is not that a distinction is made between common carriers and private carriers, but between private carriers themselves, although they are alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route.

The principle that the State has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this Court. *Central Lumber Company* v. *South Dakota*, 226 U. S. 157, 161; *Miller* v. *Wilson*, 236 U. S. 373, 382, 384; *Bekins Van Lines* v. *Riley*, 280 U. S. 80, 82; *Silver* v. *Silver*, 280 U. S. 117, 123; *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 73. But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the State's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with moter vehicles, and we entertain no doubt of the power of the State to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. "Such a classification is not based on anything having relation to the purpose for which it is made." *Air-Way Corporation* v. *Day*, 266 U. S. 71,

85; *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, 563, 564; *Southern Railway Company* v. *Greene*, 216 U. S. 400, 417; *Truax* v. *Corrigan*, 257 U. S. 312, 332, 333; *Louisville Gas & Electric Company* v. *Coleman*, 277 U. S. 32, 37.

For these reasons, we hold that the statute was invalid as applied to the appellant, and it is unnecessary to consider the questions that have been raised with respect to the validity of the provision for the mileage tax, separately considered. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.